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IN THE
Supreme Court of the United States

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,
Petitioners,

v.

GLADYS ELAINE BLANTON JENKINS,
Respondent.

On Petition For A Writ of Certiorari To The Court Of Appeals Of Texas Seventh District

PETITION FOR A WRIT OF CERTIORARI

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
JOHN S. EDWARDS, JR.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES "CHAD" BARUCH
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a statement concerning possible corruption by a public official—made solely in a petition for redress of grievances addressed to government authorities empowered to investigate those claims—can support an action for libel, or whether that statement is absolutely privileged under the Petition Clause of the First Amendment.

2. Whether, even if a public figure may bring an action for libel based on a statement made solely in a petition for redress of grievances, the First Amendment nonetheless protects from liability those who merely relay defamatory statements made by others.

3. Whether this Court should overrule *McDonald* v. *Smith*, 472 U.S. 479 (1985).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Paul Martin Clark and Black Citizens for Justice, Law and Order, Inc. Respondent is Gladys Elaine Blanton Jenkins.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Black Citizens for Justice, Law and Order, Inc., has no parent corporation. No publicly held company owns 10% or more of its stock.

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On Petition For A Writ of Certiorari To The Court Of Appeals Of Texas Seventh District

Petition For A Writ Of Certiorari

Petitioners Paul Martin Clark and Black Citizens for Justice, Law and Order, Inc. (collectively "BCJLO") respectfully submit this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh District of Texas.

Opinions And Orders Below

The Texas Supreme Court's orders refusing discretionary review are unreported. App., *infra*, at 50a, 49a. The opinion of the Court of Appeals for the Seventh District of Texas is reported at 248 S.W.3d 418. *Id.* at 1a-45a. The judgment entered by the Henderson County District Court is unreported. *Id.* at 46a-48a.

Jurisdiction

The Court of Appeals for the Seventh District of Texas filed its opinion on February 22, 2008. The Texas Supreme Court denied a timely petition for discretionary review on September 26, 2008, and denied a timely petition for rehearing on December 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement Of The Case

This case presents an ideal vehicle for this Court to revisit its ill-founded decision in *McDonald* v. *Smith*, 472 U.S. 479 (1985), which held that the right to petition does not afford absolute immunity against libel actions based on statements made in petitions to government officials. *McDonald* was wrong when it was decided and has rightly been the subject of substantial scholarly criticism. The *McDonald* decision was premised on fundamental misconceptions about the history and original understanding of the petition right, is inconsistent with this Court's interpretation of the right in other contexts, and imposes a serious chilling effect on the ongoing exercise of individual citizens' vital right to petition the government for redress of grievances.

Black Citizens for Justice, Law and Order, Inc., was founded 40 years ago in Dallas, Texas, in response to discrimination against African-American

citizens. App. 2a. BCJLO's initial purpose was to bring citizen complaints against the Dallas police to the attention of the proper authorities. App. 2a. Daisy Evella Joe, BCJLO's Chief Executive Officer, began as a volunteer with the organization in 1982. App. 3a.

Athens, Texas, is a small town of about 11,000 people located approximately 70 miles southeast of Dallas. For years, some members of the African-American community in Athens have accused municipal officials and police officers of racial discrimination. 2 RR 215-16.[1] In 1999, the Civil Rights Division of the U.S. Department of Justice assisted Athens citizens and the Athens Police Department in developing a memorandum agreement concerning police operations. App. 3a. In 2001, certain Athens citizens first contacted Ms. Joe in the hopes that she could persuade Congressman Pete Sessions, with whom she had worked on other discrimination complaints, to investigate their allegations of continuing misconduct by Athens officials. 3 RR 19-21, 39.

In 2002, several Athens citizens asked to meet with the city council to discuss the memorandum agreement. App. 4a. The agreement had expired, and a new police chief was replacing the current chief (and signatory to the agreement). App. 4a. The city council scheduled that discussion for its next pre-meeting workshop. 2 RR 29. The citizens invited Ms. Joe to attend the workshop and hear their complaints. 3 RR 20. Ms. Joe could not attend the workshop, so she sent BCJLO volunteer Paul Martin Clark to take

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[1] "RR" refers to the reporter's record. "CR" refers to the clerk's record. Citations are to the volume of each record, followed by the page number in that volume.

notes to forward to Congressman Sessions for investigation. App. 5a. Mr. Clark took notes at the workshop and a subsequent citizens meeting. He reduced his notes to a memorandum that he gave to Ms. Joe. After a cursory review, she instructed Mr. Clark to send the memorandum to Congressman Sessions and the Justice Department. 3 RR 23-27.

Mr. Clark's memorandum recounted accusations against Athens officials made by speakers at the meeting and sought "attention and immediate action by Congress and the Justice Department." App. 41a. The memorandum contained the false statement that Gladys Jenkins—the sole African-American member of the city council—"is a convicted felon having served prison time in Texas and California for Prostitution and Drugs."[2] App. 42a. There is no allegation or evidence that BCJLO or Mr. Clark made this statement to anyone other than Congressman Sessions or the Justice Department.

Mr. Clark testified that he simply recounted statements made in the meeting, and neither knew nor considered the truth of those statements, including the allegation about Ms. Jenkins. 1 RR 160, 176 ("The question and thought of veracity never came up. I don't know these people. I was simply asked to take notes."); 3 RR 128-29 ("I don't have any belief or disbelief. I don't know the people. And I'm sorry if the council member is upset. I don't know these people. I'm sorry."). Likewise, Ms. Joe did not know or consider the truth of the allegation. 3 RR 33-34, 40.

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[2] The memorandum went on to state that "[n]o one in the State of Texas can hold elective office who has felony convictions." App. 6a.

BCJLO never investigated the allegation, because Ms. Joe and Mr. Clark expected Congressman Sessions to do so. 3 RR 41-42, 51. But instead of initiating his own investigation as in the past, Congressman Sessions faxed the memorandum to the Athens mayor—one of the officials about whom the citizens had complained. 3 RR 98. When the mayor received the memorandum, he distributed copies to various city officials including Ms. Jenkins. 2 RR 221. Ms. Jenkins volunteered to be fingerprinted to prove she had never been in prison in Texas, California, or anywhere else. 2 RR 76-77.

Ms. Jenkins filed suit against BCJLO and Mr. Clark for defamation based solely on the false statement in the memorandum that Ms. Jenkins "is a convicted felon having served prison time in Texas and California for Prostitution and Drugs." App. 42a. After Ms. Jenkins rested her case-in-chief, BCJLO moved for a directed verdict, asserting that the statement was protected by the right to petition under both the state and federal constitutions and that Ms. Jenkins failed to present clear and convincing evidence of actual malice. 2 RR 281-83. The trial court denied that motion. 2 RR 284. The jury awarded Ms. Jenkins actual damages of $300,000 jointly and severally, along with exemplary damages of $100,000 against each defendant. App. 47a. BCJLO moved for judgment notwithstanding the verdict, again under both the state and federal constitutions, and on actual malice grounds. 3 CR 306-11. The court denied that motion and rendered judgment in accordance with the jury's verdict. 3 CR 312-13, 324.

The Court of Appeals for the Seventh District of Texas affirmed in a published opinion. App. 1a-45a.

First, the court rejected BCJLO's argument that the right to petition in the state and federal constitutions[3] affords absolute immunity against defamation suits based on statements in good-faith petitions to government officials seeking redress of grievances. App. 12a. Interpreting the right to petition under the Texas Constitution, the court of appeals expressly relied upon and found "persuasive" this Court's opinion in *McDonald*. App. 14a. The court acknowledged that "[a]bsolute privilege attaches to all communications published in the court of judicial proceedings." App. 12a. And the court recognized that under the *Noerr-Pennington* doctrine established by this Court, a similar privilege against antitrust liability attaches to petitioning the government to take anticompetitive action. App. 23a. Nonetheless, the court held that the statement in the memorandum was subject only "to a qualified privilege permitting liability in a defamation action" if the statement was made with actual malice. App. 24a.

Second, the court essentially adopted Ms. Jenkins' view that the memorandum itself was sufficient proof of actual malice. App. 24a. The court recognized that a "public figure may not recover damages for a defamatory falsehood without clear and convincing proof the false statement was made with 'actual malice,' *i.e.*, with knowledge the statement was false or with reckless disregard of whether it was false or

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[3] BCJLO "recognize[d] that [the state court's] decision with respect to the U.S. Constitution [was] controlled by *McDonald*," but raised the issue whether "defamatory statements made in a petition to the government—even when made with actual malice—[are] absolutely privileged under the Petition Clause[ ] of the * * * United States Constitution" to "preserve" that issue for review in this Court. App. 57a.

not." App. 24a. And the court acknowledged that reckless disregard requires "evidence the defendant made the false publication with a high degree of awareness of probably falsity, or entertained serious doubts as to the truth of his publication." App. 25a. But despite the uncontroverted testimony of both Mr. Clark and Ms. Joe that they never even considered the truth or falsity of the statement, but merely reported what had been said by others, 1 RR 160, the court held that the constitutional requirement of clear and convincing evidence of actual malice had been satisfied.

On June 17, 2008, BCJLO filed a petition for discretionary review in the Texas Supreme Court. On September 26, 2008, that court refused review. BCJLO filed a timely petition for rehearing, which the Texas Supreme Court denied on December 5, 2008.

REASONS FOR GRANTING THE PETITION

This case presents an important First Amendment issue and a straightforward opportunity for this Court to correct a stark anomaly in its First Amendment jurisprudence. *McDonald* v. *Smith* cannot be reconciled with the original understanding of the Petition Clause, or with this Court's vigilant protection of the right of citizens to hold public officials accountable. *McDonald* imposes a serious chilling effect on the right to petition, and subjects that right to civil liability antithetical to a robust democracy. This case is an ideal vehicle, with the question cleanly presented, free of any factual ambiguities or complications.

There is no split of authority on the issue, nor will there ever be. Because *McDonald* is binding Supreme Court precedent, all lower courts are obliged to follow it. *McDonald* has rightly been subjected to substantial

scholarly criticism, but unless and until the Court corrects the error, there will be no way to alter that decision. Thus, there is no value to waiting for a split to develop, because the precedential force of *McDonald* prevents that from ever happening.

McDonald has been widely criticized for its historical inaccuracy, its infidelity to the Founders' vision of the right to petition, and its inconsistency with this Court's treatment of that right in other contexts. The Founders considered the right to petition a critical component of our republican form of government. Just as the Constitution establishes checks and balances between branches of government, the right to petition establishes an important check between the people and government. And the Founders knew well that any interference with the right to petition threatens the ability of the people to check the organized institutions of government. The delineation of a right to petition in the First Amendment—separate from the right to free speech—demonstrates the Founders' intent to protect that right. And historical documents establish that at the time the Founders included the right to petition in the Constitution, the notion of absolute immunity for citizen-petitioners was well established under English and American law.

The practice of exposing citizen-petitioners to libel is a relatively recent phenomenon, and reverses the immunity for petitioners that dates to the 1680s and was well established by the American Revolution. The practical implications of that reversal are great. Citizens with personal knowledge—or even strong suspicion—of government abuses are less likely to report them if doing so can subject them to retaliatory lawsuits for defamation. That concern is partic-

ularly acute in rural and small-town America, where citizens with few resources and limited access to counsel may rely upon petitioning to seek investigation of their complaints. The chilling effect on those citizen-petitioners created by *McDonald* and reinforced by the judgment below is anathema to the Founders' vision for American government.

The Founders intended for citizens to check government, not for the government—through liability imposed by the judicial system—to check citizens. *McDonald* imposes unjustifiable limitations on the exercise of the right to petition that necessarily interfere with its proper role in checking governmental abuse. Given this Court's supremacy, no other tribunal has the power to reconsider *McDonald*—and thus there is not and never can be a split of authority or conflict among the lower courts. Whether the Petition Clause affords citizens absolute immunity against libel is not only of great doctrinal significance, but also of great practical importance. It is an important question of law that should be resolved by this Court.

Even if the constitutional right to petition did not afford absolute immunity to citizens who petition their government, the Court should nonetheless grant the petition, reverse the judgment below, and resolve conflicts among the lower courts regarding if and how speakers may relate allegations made by others without being subject to liability for republishing defamatory statements. That question has arisen repeatedly in the lower courts, which have reached conflicting conclusions. Although the Court has recognized this open—and important—First Amendment question, it has never squarely addressed it. The Court's review is needed to resolve the

conflicts and provide guidance in an important, unresolved area of constitutional law.

I. *MCDONALD'S* UNDERSTANDING OF THE PETITION RIGHT CANNOT BE RECONCILED WITH THE TEXT, HISTORY, AND ORIGINAL UNDERSTANDING OF THE PETITION CLAUSE

The Petition Clause provides that "Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I, cl. 6. The petition right is not only "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" but also "implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co.* v. *N.L.R.B.*, 536 U.S. 516, 524-25 (2002) (quoting *Mine Workers* v. *Ill. Bar Ass'n*, 389 U.S. 217, 222 (1967) and *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875)). Since the early days of our Nation, citizens have used petitioning to expose, among other things, "[m]aladminstration or corruption among public agents" and "misconduct by local officials." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 154 (1986); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1156 (1991) (explaining that "part of the purpose and effect of the petitions was to help inform representatives about local conditions"). Under this Court's decision in *McDonald*, citizen-petitioners seeking investigation of possible government corruption are entitled only to qualified immunity from libel actions. But history refutes that crabbed understanding of the petition right. In both England and colonial America, citizen-petitioners were absolutely immune from pri-

vate libel actions—and nothing in the text of the First Amendment, its drafting history, or the views of the Founders suggests any intention of narrowing the scope of that longstanding right.

A. Significant, Persuasive Historical Evidence Establishes That The Petition Clause Was Originally Understood To Provide Absolute Immunity Against Libel Actions

The roots of the Petition Clause run to Magna Carta, which contained the first formal expression of the right to petition. 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDER'S CONSTITUTION 187 (1987). From the beginning, the right to petition represented the means by which citizens enforced other rights guaranteed to them, and checked infringements on them by government. In the 300 years following Magna Carta, the petition right became an important and cherished part of English political life. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2169 (1998); David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, 115 (1991). Immunity from judicial and executive retaliation for petitioning developed alongside the petition right. Van Vechten Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L.J. 131, 132 n.4 (1910).

1. Petitioners Had Absolute Immunity Against Libel Suits In Pre-1791 England

Historical analysis of the petition right is crucial because, as this Court has explained, rights under the Bill of Rights are preserved as they existed in

1791. See, *e.g.*, *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974); *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). History teaches that the right to petition predated other expressive rights, such as freedom of speech and of the press. But the most important historical lesson is that in England after 1702, the right to petition was an absolute right against the government.

English courts resolved the precise question presented in *McDonald*—whether statements made in a petition can support a defamation claim—during the 1680s. In *Lake* v. *King*, 85 Eng. Rep. 137 (K.B. 1668-1669), a citizen was sued for libel after sending a petition to a committee of Parliament in which he accused a public official of extortion. The court held that a libel action could not be based on a petition to a committee with the power to redress the grievance:

> And it was agreed that the exhibiting of the petition to a Committee of Parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false.

Id. at 139. English courts extended immunity to petitions to the King soon afterward in the *Trial of the Seven Bishops* (1688), 12 A COMPLETE COLLECTION OF STATE TRIALS 183 (T.B. Howell ed., 1816), which established absolute immunity for petitioning in English law. In 1687, James II issued his declaration for Liberty of Conscience providing for freedom of worship and commanding all clergy to read and distribute it in their churches. The Archbishop of Canterbury and six other bishops petitioned the King asking to be excused from that duty. The King responded by

having them arrested and charged with seditious libel. In a landmark enunciation of the broad scope of immunity for petitioning, the bishops were acquitted making clear the principle of immunity from libel for petitioners under English law.

England resolved any lingering doubt about immunity a year later by adopting the Declaration of Rights, providing "[t]hat it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal." SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 464 (George Burton Adams & H. Morse Stephens eds., 1927). The Declaration of Rights codified the understanding in England that statements in petitions could not support libel actions. The only restriction that Blackstone, "whose works," the Court has said, "'constituted the preeminent authority on English law for the founding generation,'" *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2798 (2008) (quoting *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)), recognized on "the right of petitioning the king, or either house of parliament" to redress injury was the numerical limitation placed by Parliament on the number of signatures and the number of individuals allowed to present a petition. WILLIAM BLACKSTONE & THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND 1:77, 92 (1871). Blackstone justified that restriction as a means of avoiding riots or disruptive presentation of petitions. *Ibid.* In his American edition of Blackstone, St. George Tucker took obvious satisfaction in reminding his readers that "[i]n America, there is no such restraint." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES;

AND OF THE COMMONWEALTH OF VIRGINIA, App. 299-300 (1803).

2. The Petition Right Assumed Even Greater Importance In Colonial America

While some English rights were abandoned or narrowed in the colonies, the petition right was expanded. Petitioning was critical to political life in colonial America. Indeed, unlike other rights such as suffrage, petitioning was not restricted. "Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves, exercised their rights to petition the government for redress of grievances." Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 688-89 (2003) (internal citations omitted). That broad petition right existed alongside significant restrictions on non-petition speech: "Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment." Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 37 (1993).

Yet petitioning—including the right to criticize government officials without fear of reprisal—continued unabated throughout this period. North Carolina, Georgia, Vermont, Rhode Island, Connecticut, Delaware, Maryland, Pennsylvania, Massachusetts, and New Hampshire all guaranteed the petition right in their state constitutions or charters. Frederick, *supra*, at 117 n.18. By the American Revolution, petitioning played a central role in the American con-

cept of self-government. Indeed, the Declaration of Independence marked King George III's infringement of the petition right as tyrannical: "In every state of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." THE DECLARATION OF INDEPENDENCE para 3 (U.S. 1776).

All this took place during a period when the colonial freedoms of speech and press were undeveloped. As in England, the right of petition developed as the far stronger right. "In both England and the American colonies, citizens could petition government on any subject without fear of punishment, an important protection unmatched by the right of free speech." Frederick, *supra*, at 115-16 (citation omitted). With harsh sedition laws proscribing anti-revolutionary speech, the less-restricted right to petition was frequently the only means by which citizens could communicate criticisms to the government without risking prosecution. Spanbauer, *supra*, at 37-38. In the colonies, as in England, petitioning represented the primary tool by which citizens expressed their grievances to government. Far from being subsumed by free speech, the right to petition both preceded and exceeded free speech rights.

3. The Petition Right Enshrined In The Constitution Was Virtually Absolute

The Constitution as originally drafted did not contain any express protection of the right to petition, and anti-federalists seized on that omission to criticize the document. Wishnie, *supra*, at 694 n.153.

James Madison, who envisioned a petition right separate from free speech rights, set about remedying this deficiency by proposing the following amendment: "The people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971). Eventually the petition right was placed alongside the rights of speech, press, assembly, and religion to form the First Amendment. 1 ANNALS OF CONG. 451 (Joseph Gales, ed. 1789). In his endorsement of the amendment before the House, Madison called upon the representatives to "expressly declare the great rights of mankind secured under this constitution." *Id.* at 449.

During debates on the Petition Clause, there is no record of anyone challenging the scope of the petition right as practiced in England and the colonies, including the absolute immunity from liability for defamation established in *Lake* and the *Seven Bishops*. "[T]here is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states." Eric Schnapper, "*Libelous*" *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 345 (1989).

Once enumerated in the First Amendment, the petition right enjoyed favored status. By the early 1800s, a substantial portion of Congressional energy was devoted to considering citizen petitions. Perhaps no American of the founding era evinces the importance of the petition right better than John Quincy

Adams. In the waning years of his life, Adams fulminated against pro-slavery advocates seeking to limit the right of petition. Adams risked his career and his reputation on an impassioned and sustained defense of the right to petition, which he deemed "essential to the very existence of Government; it is the right of the people over the Government; it is their right, and they may not be deprived of it." JOSEPH WHEELAN, MR. ADAMS'S LAST CRUSADE 161 (2008). When Adams collapsed and died in the House chambers in 1848, two of his very last official actions were the introduction of petitions. *Id.* at 246-48.

Throughout early American history, American courts knew and respected the rule of absolute immunity for petitioners set forth in *Lake* and the *Seven Bishops*. The earliest judicial expression of immunity for petitioning in the United States came in *Harris* v. *Huntington*, 2 Tyl. 129 (Vt. 1802)—a case strikingly similar to this one. In *Harris*, a citizen made false and malicious statements about a public official in a petition to the government. The official sued for libel. Rejecting the libel claim, the court held that petitioning was absolutely privileged:

> An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of the petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it.
>
> And it would be equally destructive of the right, for the Courts of Law to support actions of defamation grounded on such petitions as libelous.

Id. at 139-40. In reaching that conclusion, the court used reasoning equally applicable to this case:

> Petitions for redress of grievances will generally point to officers of the government, who have, or may be supposed to have abused its confidence by mal-administration; and although government should refrain from prosecuting the petitioners criminally, yet it operate as effectual a restraint upon them to expose them to an action for damages at the suit of those whose conduct they have complained to government.

Id. at 140. In particular, the court reasoned that petitioning must be protected by absolute immunity even though it may result in occasional injury to reputation:

> But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare.

Id. at 146. *Harris* demonstrates not only the scope of the petition right in the decades immediately following the Nation's founding, but also that early American courts understood citizen-petitioners to enjoy absolute immunity from suit in the new republic just as in England.

B. *McDonald* Is Fundamentally Inconsistent With The History And Original Understanding Of The Petition Right

Although there is overwhelming historical evidence establishing the intent to continue the tradition of absolute immunity in the founding of the American republic, there is not one shred of evidence to suggest

that the Founders intended to provide *less* immunity for petitioning than their English forebearers provided. *McDonald*'s holding that statements made in a petition can support a claim for defamation if made with actual malice is thus difficult, if not impossible, to square either with the historical record or the original understanding of the petition right.

The facts of *McDonald* are straightforward. After a citizen wrote a letter to President Reagan inveighing against a candidate for U.S. Attorney, the candidate sued for libel. The Court held the Petition Clause did not insulate the citizen from liability under state defamation laws, concluding that the petition right is not absolute and the actual malice standard applies to petitioning. According to *McDonald*, "[t]he right to petition is cut from the same cloth as the other guarantees of [the first] amendment." 472 U.S. at 482. Thus, it remains subject to the same analytical standards as the speech guarantee because "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* at 485.

In reaching that conclusion, *McDonald* gave scant attention to the evolution and history of the petition right before its incorporation into the First Amendment. The Court relied instead on post-ratification materials—and the opinion cites only six pre-twentieth-century authorities. The sole reference to seventeenth-century libel law is a citation of *Lake*, which held that statements in petitions were absolutely privileged. Taken together, the majority and

concurring opinions contain only two historical references—and even those references are incomplete.[4]

McDonald thus rests on a historical understanding of the petition right that is incomplete at best. Properly comprehended, that history reveals that the petition right evolved in both England and America into a broad right distinct from the rights of speech, press, and assembly. Petitioning encompassed written requests submitted to the executive, legislative, or the judicial branch of government and generally was not curtailed. In contrast, the rights of speech and the press were burdened by seditious libel laws, and the right of assembly was restricted by regulations limiting the number of individuals allowed to meet and discuss petitions and requiring those groups to act in a peaceful, orderly manner. *McDonald*'s analysis of petitioning has it exactly backwards: The right to petition was the preeminent right; its development preceded and fostered the rights of speech, assembly, and the press. Spanbauer, *supra*, at 68-69.

The historical evidence thus leads to one, inescapable conclusion: In 1791, there was a well-established

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[4] For example, the majority opinion characterizes a parliamentary enactment in "the 1790's" that made public meetings of more than 50 persons illegal if assembled for the purpose of petitioning without a magistrate present as an "attack" on the right to petition. *McDonald*, 472 U.S. at 484 n.5. But the law merely regulated assembly incidental to petitioning, not petitioning itself—and it imposed no penalty or damages upon the content of a petition. Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1186-87 (1986). Moreover, the law was enacted in 1795—four years after the year in which the common and constitutional law of England was fixed for purposes of interpreting the Bill of Rights.

common-law rule barring libel actions based on the contents of a petition. That rule had been consistently reiterated in judicial opinions and legal treatises for over a century. By the end of the eighteenth century, not a single commentator or reported decision had questioned the holding of *Lake* in any way. Had McDonald written his letter to President Washington or King George III, Smith's libel action would have been dismissed out of hand.

C. *McDonald* Has Been Widely Criticized By Courts And Commentators

McDonald has been roundly criticized as "incorrectly hold[ing] that the right to petition does not accord the petitioner with an absolute privilege against liability for defamation." Norman B. Smith, "*Shall Make No Law Abridging . . .*": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1196-97 (1986) ("[*McDonald*] failed to give adequate consideration to the history, textual development, and draftsmen's intent of the right to petition and to the purposes and interests it serves."); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 739 (1999) ("The near-unanimous conclusion of the modern commentators * * * is that there is more to the Petitions Clause than is generally recognized by the Supreme Court's jurisprudence or by contemporary understandings and practice."); Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 103 (1996) ("The Petition Clause issue in *McDonald* * * * was given little thoughtful attention by the Court and the resulting decision is seriously flawed."); Spanbauer, *supra*, at 17 ("[C]ontrary to the Court's assertion, the right to

petition was cut from a different cloth than were the rights of speech, press, and assembly. Historically, the right to petition was a distinct right, superior to the other expressive rights."); Schnapper, *supra*, at 347 ("*McDonald* v. *Smith* yielded a result almost certainly contrary to the framers' intent concerning the petition clause.").

The scholarly consensus is clear: *McDonald* "reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right." Smith, *supra*, at 1153. Some commentators have even argued that "[b]y treating petitioning as a mere form of expression, subject to the same constitutional standard as speech, the Court semantically wrote the Petition Clause out of the Constitution." Gary, *supra*, at 114; *see also* Frederick, *supra*, at 142 (noting that the *McDonald* Court's assimilation of the petition right into free speech rights "has produced a clause in the first amendment curiously devoid of meaning").

Recently, one state court jurist concluded that "*McDonald* was incorrectly decided" and called upon this Court to "revisit its Petition Clause jurisprudence" in light of the "significant, persuasive historical evidence suggesting that * * * *McDonald* is incompatible with the original understanding of the Petition Clause." *J & J Constr. Co.* v. *Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 735-36, 752 (Mich. 2003) (Young, J., concurring). In a thorough and thoughtful concurring opinion, Justice Young "[laid] out the historical record supporting a conclusion based on an originalist understanding of the Petition Clause" in the "hope that [the Court] may choose an alternative course to the one suggested by *McDonald*." *Id.* at 736. "Despite what I believe is a

compelling historical and textual case for according the Petition Clause distinctive meaning," Justice Young explained, "by the twentieth century, the federal judiciary had all but relegated the Petition Clause to the status of a step-sibling without independent identity or import apart from the Free Speech Clause and the Free Press Clause of the First Amendment." *Id.* at 751. Because "the history and text of the petition right * * * support an interpretation that the Petition Clause is distinct from its First Amendment siblings and therefore deserves consideration regarding whether distinct treatment in the constitutional law of defamation is warranted under the Petition Clause," Justice Young agreed with the overwhelming view of scholars that "*McDonald* was incorrectly decided."[5] *Id.* at 752.

D. *McDonald* Cannot Be Reconciled With This Court's Interpretation Of The Petition Clause In Other Contexts

McDonald is also in "irreconcilable conflict," Gary, *supra*, at 70, with the Court's cases holding that the petition right insulates certain conduct from the reach of otherwise applicable antitrust laws. *See E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Paradoxically, "the more protective *Noerr*-

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[5] Although the Court denied *certiorari* in that case, the petitioner there did not present the issue whether the Petition Clause affords absolute immunity to citizen-petitioners against libel. See *Bricklayers & Allied Craftsmen v. J & J Constr. Co.*, No. 03-667, available at 2003 WL 22574933, at *1 (*petition for cert.* filed Oct. 31, 2003).

Pennington standard has been [used] * * * for commercial (antitrust) cases and the less protective actual malice standard has been applied to cases implicating fundamental political participation." Gary, *supra*, at 70. Yet the *McDonald* Court "bypassed discussion of the *Noerr-Pennington* doctrine" and, in doing so, "ignored its own precedent regarding the importance of the petition right and the perniciousness of retaliatory litigation." *Id.* at 134.

The *Noerr-Pennington* doctrine allows companies to associate for the purpose of influencing the government, even though their association otherwise would violate antitrust laws—and even where their intent in petitioning the government is to eliminate competition. Even then, their activities remain protected by the Petition Clause. In reaching that conclusion, this Court emphasized the critical importance of the free flow of information between citizens and their government: "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137. This Court did, however, impose one important limitation on the right: Petitioning is not protected when it is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144.

This Court further extended petitioning protections in the antitrust context in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), which involved a dispute between two advertising compa-

nies. As newcomer Omni attempted to gain a local foothold, competitor COA successfully lobbied city officials to adopt zoning ordinances that destroyed Omni's ability to compete. Omni sued, claiming that COA's petitioning was a sham designed to interfere directly with Omni's business. A jury awarded Omni damages, but this Court reversed, holding that the case should have been dismissed. Even the dissenters agreed with the majority that the Petition Clause shields efforts "'to influence public officials regardless of intent or purpose.'" *Id.* at 380 (quoting *Pennington*, 381 U.S. at 670).

After *Omni*, the test for protection under the Petition Clause in the antitrust context is clear: Petitioning aimed at procuring government action is protected without regard to other motive or purpose. It is difficult to reconcile that conclusion with *McDonald*'s holding that communications with government officials can give rise to a libel suit—particularly as "the right to petition does more than ensure that government officials are apprised of the opinions held and the facts known by the citizenry. It also promotes the confidence that the government is accessible and answering to the people." Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 101 (1977). Thus, "the *Noerr-Pennington* sham level of immunity is an appropriate safeguard for the Petition Clause guarantee, regardless of the underlying claim challenging the petition right." Gary, *supra*, at 133.

II. THE CONTINUING VITALITY OF *MCDONALD* IS AN ISSUE OF SUBSTANTIAL IMPORTANCE

The question presented in this case—whether the Petition Clause provides absolute immunity from libel suits—has significant real-world implications. Undoubtedly, the threat of a libel action that will be costly to defend and of uncertain outcome (as with all litigation) can deter citizens from providing information to their elected officials—a result completely at odds with the interests served by the petition right. As this Court has explained:

> A lawsuit no doubt may be used * * * as a powerful instrument of coercion or retaliation. * * * Regardless of how unmeritorious the * * * suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it. * * * Furthermore, * * * the chilling effect * * * upon a [defendant's] willingness to engage in [constitutionally] protected activity is multiplied when the complaint seeks damages in addition to injunctive relief.

Bill Johnson's Rests., Inc. v. *N.L.R.B.*, 461 U.S. 731, 740-41 (1983) (internal citation omitted). That threat is serious indeed: According to a recent 20-year survey of libel suits involving media defendants, the average initial award was $2,962,525 and the median was $200,000.[6] See also GEORGE PRING & PENELOPE

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[6] Media Law Resource Center, *Libel Defense Resource Center Releases Findings of New Two-Decade Survey On Trials against Media Defendants*, Feb. 2, 2000, Press Release, *available at* http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=708 (last visited Mar. 5, 2009).

CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 1 (1996) ("Americans by the thousands are being sued, simply for exercising one of our most cherished rights: the right to communicate our views to our government officials, to 'speak out' on public issues.").

Moreover, the distinction created by *McDonald* in the treatment of public officials and private citizens only encourages needless litigation. Because statements made in judicial proceedings are entitled to absolute immunity—while those same statements in petitions to the government are not—individuals who believe they have been mistreated (*e.g.*, by an IRS agent or a police officer) must think twice before complaining to the officer's superiors, but have no similar reason to hesitate about taking the matter to court. *McDonald* thus has the perverse effect of "encourag[ing], at times perhaps even compel[ling], grievants with serious but potentially libelous complaints to file lawsuits rather than seek redress from elected officials." Schnapper, *supra*, at 344. That incentive to litigate is the inevitable effect of *McDonald*'s needless distinction between public officials and private citizens—and between petitioning and judicial proceedings.

Had Congressman Sessions taken the floor of the U.S. House of Representatives and repeated the defamatory statement on C-SPAN, he would enjoy an absolute privilege as a legislator against a defamation suit by Ms. Jenkins. See *Doe* v. *McMillan*, 412 U.S. 306 (1973). A Justice Department official who repeated the defamatory statement in a press release likewise would enjoy an absolute privilege as an executive official. See *Barr* v. *Matteo*, 360 U.S. 564 (1959). If the mayor of Athens, Texas, had done the same thing at a city council meeting, he too would

enjoy an absolute privilege as a high-ranking local official. See *City of Cockrell Hill* v. *Johnson*, 48 S.W.3d 887 (Tex. App.—Fort Worth 2001, pet. denied). And if Mr. Clark and Ms. Joe had traveled to Washington, D.C., to make the same statement about Ms. Jenkins during a congressional hearing, they too would have enjoyed an absolute privilege against Ms. Jenkins' libel suit. See *Webster* v. *Sun Co.*, 790 F.2d 157 (D.C. Cir. 1986).

The "absolute immunity" accorded "to the executive, legislative, and judicial participants" in such a controversy is "based in part on a recognition that such risks would impose an intolerable burden on the ability of government officials to speak their minds." Schnapper, *supra*, at 312. The need to maintain open channels of communication between citizens and their government is no less vulnerable to that "intolerable burden"—and no less worthy of constitutional protection. If ordinary citizens are not afforded absolute immunity from libel suits based on petitions to the government, the inevitable consequence will be a particularly severe restraint on the right to petition. Just as allowing a defense of truth "does not mean that only false speech will be deterred," *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964), a mere claim of knowing falsity will subject ordinary citizens—as it has Mr. Clark and Ms. Joe in this case—to the certainty of substantial costs and the risk of enormous damages. The right to petition would be meaningless if ordinary citizens knew they might be required to pay $500,000 or more for the privilege of writing a letter to their Congressman or the Justice Department.

III. ANY ARGUMENT FOR RETAINING *MCDONALD* WOULD BE INSUFFICIENT TO JUSTIFY ITS CONTINUING EXISTENCE

Considerations of *stare decisis* do not justify leaving *McDonald*'s flawed constitutional holding intact. That doctrine—never an "inexorable command" and even less so in constitutional cases—should not operate to insulate *McDonald* from reconsideration. See *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). One state court jurist, acknowledging that the lower courts are constrained to follow *McDonald* in construing the Petition Clause, has nonetheless expressed the "hope" that:

> [The Court] may choose an alternative course to the one suggested by *McDonald* [considering] significant, persuasive historical evidence suggesting that the contemporary understanding of the Petition Clause as announced in *McDonald* is incompatible with the original understanding of the Petition Clause.

J & J Constr. Co., 664 N.W.2d at 735-36 (Young, J., concurring).

By any measure, *McDonald* bears none of the hallmarks of cases like *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that this Court has described as embedded in our "national culture." See *Dickerson* v. *United States*, 530 U.S. 428, 430 (2000). This Court has cited *McDonald* only once in the 23 years since it was decided. *Heller*, 128 S. Ct. at 2790 n.5 (citing *McDonald* for the proposition that the right to petition is "an individual right"). Nor are there any economic or other reliance interests, nor any issues of statutory interpretation, that have led the Court to determine in other contexts that it is more important that the

law "be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (internal citations and quotations omitted). In sum, no consideration of *stare decisis* points toward retaining *McDonald*—and compelling reasons support reconsidering it.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RECONSIDERING *MCDONALD*

This case presents an ideal opportunity for this Court to address the continuing vitality of *McDonald*. Most important, this case squarely presents the issue to the Court. There can be no serious question that the memorandum—which was sent both to Congressman Sessions and the Justice Department—is a "petition" within the meaning of the First Amendment. The memorandum on its face sought "attention and immediate action by Congress and the Justice Department." App. 41a. It sought an "investigation," *ibid.*, which both Congress and the Justice Department could conduct. In sending the memorandum, BCJLO exercised "the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment." *Bridges* v. *California*, 314 U.S. 252, 277 (1941). The case was tried to a jury, and the jury found the governmental petition libelous and awarded substantial damages—half a million dollars. BCJLO would necessarily be entitled to reversal if this Court overturned *McDonald* and held that the Petition Clause confers an absolute immunity against libel suits. Finally, no adequate and independent state ground exists for the judgment below that would deprive this Court of jurisdiction.

V. GIVEN THIS COURT'S SUPREMACY, NO SPLIT CAN EVER DEVELOP

There is no split of authority on the issue presented, nor will there ever be. Because *McDonald* is binding Supreme Court precedent, all lower courts are obliged to follow it. *McDonald* has rightly been subjected to substantial scholarly criticism, but unless and until the Court corrects the error, there will be no way to alter that decision. This Court's supremacy means that no other tribunal has the power to reconsider *McDonald*.

Indeed, in the wake of *McDonald*, at least one state that previously had interpreted its own petition clause to afford absolute immunity reversed course and adopted--with little analysis—the contrary view articulated in *McDonald*. See, *e.g.*, *Harris* v. *Adkins*, 432 S.E.2d 549 (W. Va. 1993) ("agree[ing] with the reasoning of *McDonald*" and reversing earlier holding in *Webb* v. *Fury*, 282 S.E.2d 28 (W. Va. 1981), that state petition clause provided absolute immunity). Thus, there is no value to waiting for a split to develop, because the precedential force of *McDonald* prevents that from ever happening.

VI. THIS CASE PROVIDES AN OPPORTUNITY FOR THE COURT TO RESOLVE CONFLICTS AMONG THE LOWER COURTS REGARDING WHEN REPUBLICATION MAY BE PUNISHED

Even if the constitutional right to petition did not afford absolute immunity to citizens who petition their government, the Court should nonetheless grant the petition, reverse the judgment below, and resolve conflicts among the lower courts regarding if and how speakers may relate allegations made by others without being subject to liability for repub-

lishing defamatory statements. That question has arisen repeatedly in the lower courts, which have reached conflicting conclusions. Although the Court has recognized this open—and important—First Amendment question, it has never squarely addressed it. See *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 660 n.1 (1989) (explaining that petitioner did not raise the "neutral reportage doctrine" as a basis for overturning libel judgment). The Court's review is needed to resolve the conflicts and provide guidance in this important, unresolved area of constitutional law.

In the seminal case of *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977), the Second Circuit fashioned a "neutral reportage doctrine" premised on its view of First Amendment dictates. That case involved a newspaper report that quoted allegations made by the Audubon Society that certain scientists were being paid to lie about the effect of DDT on the bird population. Without defining the precise contours of the doctrine, the court suggested that at least when charges are made by a responsible, prominent organization, in the course of a public controversy, against a public figure, and are presented in an accurate and disinterested manner, the charges may be reported with impunity, "regardless of the reporter's private views regarding their validity." *Id.* at 120.

Since *Edwards*, courts have considered whether to recognize a neutral reportage doctrine, and if so, what its contours should be, reaching a variety of conclusions. Some courts have held that the doctrine should be limited to allegations by "responsible" parties. See, *e.g.*, *Martin* v. *Wilson Publ'g Co.*, 497 A.2d

322, 330 (R.I. 1985); *Fogus* v. *Capital Cities Media, Inc.*, 444 N.E.2d 1100, 1102 (Ill. App. Ct. 1982). Some do not. See, *e.g.*, *Price* v. *Viking Penguin, Inc.*, 881 F.2d 1426, 1444-45 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *In re United Press Int'l*, 106 B.R. 323, 329 (D.D.C. 1989). Most courts do not consider the doctrine applicable to reports that espouse the validity of the allegations themselves, but at least one court has taken a somewhat different view. See, *e.g.*, *Cianci* v. *New Times Publ'g Co.*, 639 F.2d 54, 68-69 (2d Cir. 1980) (*Edwards*' "constitutional report privilege" does not apply to article that could reasonably be read as espousing or concurring in charges made by others); but see *Price* v. *Viking Penguin, Inc.*, 881 F.2d at 1434 (doctrine immunizes reports of allegations even if speaker espouses the accuser's general position, if the description of the allegations is accurate and disinterested). Some courts have suggested that the doctrine applies only to allegations made in the context of an existing controversy. See, *e.g.*, *Barry* v. *Time, Inc.*, 584 F. Supp. 1110, 1127 (N.D. Cal. 1984) (doctrine applies only if allegations touch those involved in existing controversy and were made by a party to that controversy). Some courts have rejected the doctrine altogether. See, *e.g.*, *Tunney* v. *ABC*, 441 N.E.2d 86 (Ill. App. Ct. 1982); *Postill* v. *Booth Newspapers, Inc.*, 325 N.W.2d 511, 518 (Mich. Ct. App. 1982); *Janklow* v. *Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985).

In the decades since *Edwards*, the lower courts have been unable to fashion a coherent, reliable framework for determining whether and to what extent speakers that merely "report" the allegations of others are immunized by the First Amendment from libel suits. Compare *Global Relief Found., Inc.* v. *N.Y. Times Co.*, 390 F.3d 973 (7th Cir. 2004)

(affirming summary judgment for defendants after determining that the gist of several challenged reports was that the government was investigating the plaintiff charitable foundation, which it believed was funding terrorist activities, and that the reports had accurately described the allegations and investigation), with *Jackson* v. *City of Columbus*, 883 N.E. 2d 1060 (Ohio 2008) (reversing summary judgment for defendants in defamation action against city's public safety director based on statements in report of the director's investigation into police corruption). That confusion has left speakers and audiences not only subject to a patchwork of constitutional rules across different jurisdictions, but also at risk. The Court's guidance is needed to clarify the appropriate constitutional analysis for determining if, and when, a speaker who merely relays allegations made by others may be subjected to liability for defamation.

This case cleanly presents the core question. Here, BCJLO merely reported allegations about public officials to government actors with the authority to investigate those claims. Indeed, Mr. Clark simply relayed what was said at the meeting without ever considering the truth of the statements. As Mr. Clark put it: "The questions and thought of veracity never came up. I don't know these people. *I was simply asked to take notes.*"[7] 1 RR 160 (emphasis added). That evidence not only falls woefully short of satisfying the constitutional requirement of actual malice, but also implicates serious concerns about the

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[7] Contrary to the court of appeals' view, see App. 1a-2a, absent more, the jury's disbelief of that testimony would not establish actual malice under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

inadequacy of common law republication rules in accommodating core First Amendment values.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
JOHN S. EDWARDS, JR.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES "CHAD" BARUCH
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioners

APPENDIX

APPENDIX A

COURT OF APPEALS OF TEXAS, AMARILLO

No. 07-06-0385-CV

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,
Appellants,

v.

GLADYS ELAINE BLANTON JENKINS,
Appellee.

Feb. 22, 2008
Rehearing Overruled April 3, 2008.

OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

PATRICK A. PIRTLE, Justice.

Appellants, Paul Martin Clark and Black Citizens For Justice, Law and Order, Inc. (BCJLO), appeal from a judgment rendered in favor of Appellee, Gladys Elaine Blanton Jenkins, in a libel action. By a sole issue, Clark and BCJLO assert the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict because: (1) the defamatory statements about Jenkins were made in a written request for governmental action, making actual malice an essential element of her claim, and the evidence was insufficient to establish actual malice, (2) their statements were absolutely

privileged because they were made in a petition for redress pursuant to the Texas Constitution, and (3) there was an absence of any finding and/or evidence in support of a presumed finding their petition was a "sham" or was made in bad faith. We affirm.

Background

Jenkins,[1] a member of the Athens City Council, filed an action for libel based upon statements made in a memorandum (hereinafter the "Clark Memorandum") authored by Clark, BCJLO's President. The Clark Memorandum was addressed and published to Daisy Evella Joe, BCJLO's Chief Executive Officer, the Honorable Pete Sessions, United States Representative, and the United States Department of Justice (DOJ), Civil Rights Division. The Clark Memorandum was subsequently published to the Mayor of Athens, its City Council, the City Administrator, and Police Chief. The existence of the Clark Memorandum and its contents were generally known in Athens.

BCJLO was originally incorporated in 1969 in response to incidents involving black citizens and police officers in the Dallas metropolitan area. BCJLO's initial purpose was to bring citizen complaints against the Dallas police to the attention of the proper authorities. Over the years, BCJLO's purpose has evolved to include assisting persons in

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[1] Jenkins was born and raised in Athens. She is a mother of three children, employed as the lead teller at the Texas Trust Credit Union, and an ordained minister who practices her ministry at the Church of Living God in Athens. She was elected to the Athens City Council by the city at large, and her area of representation included North Athens.

pursuing claims before the Equal Employment Opportunity Commission.

Joe became BCJLO's volunteer director in 1982 and subsequently, CEO.[2] Clark became BCJLO's President of Membership in 2002-03. He had received training and certification as a federal records management officer at the National Archives located in Washington, D.C. At the National Archives, Clark was taught to simply record an event through note-taking without filtering what was said. Joe testified at trial that Clark had a knack for notating meetings in a very detailed manner-writing down every "and," "the," and "that."

In the mid-nineties, tension existed between North Athens' black citizens and the Athens Police Department. DOJ's Civil Rights Division assisted the parties in developing an agreement designed to open lines of communication between the Athens Police Department and the North Athens community. In 1999, a Memorandum Agreement was entered into between Athens Police Chief, the NAACP, and an organization known as the Concerned Citizens of North Athens (CCNA). A Citizens Advisory Committee was created to meet on a regular basis with the Athens Police Chief to discuss problems and issues. If necessary, these issues and problems would be brought to the attention of the City Council. The Texas Rangers also offered their assistance by investigating citizens' complaints of harassment and intimidation. From 1999 until 2006, there were six complaints filed with the Citizens Advisory Committee.

In mid-2001, Joe began receiving calls from black residents in Athens including Barbara Bowman and

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[2] Joe appeared at trial on BCJLO's behalf.

Fred Burke. Bowman and Burke were CCNA members and, subsequently, became BCJLO members. Bowman and Burke complained of intimidation and harassment by the Athens Police Department and wanted BCJLO's assistance because they believed they did not have a voice in Athens. Joe received so many calls from Athens' citizens she was hesitant to get involved. Subsequently, they started calling in on Joe's radio show, *Worker's Beat,* on KNON, with complaints related to the Athens Police Department. Bowman and others called Joe's radio show complaining that a pregnant woman was taken to jail, underwent a miscarriage, and was refused medical attention. Joe found the story hard to believe. She suggested they compile their information and submit their complaints to the authorities.

In the Fall of 2002, Pam Burton, Athens City Administrator, received letters from Joe Baggett, President of the NAACP's local chapter, and Mickey Williams of the CCNA asking to appear before the City Council to discuss the Memorandum Agreement. The agreement had expired and a new Athens Police Chief, Jim Vance, was replacing the current Chief who was a signatory to the Memorandum Agreement. Burton placed discussion of the agreement on the City Council's agenda. She also sent Baggett a letter, with a copy to Williams, indicating the City Council would be discussing the agreement at a regularly scheduled workshop to be held before the City Council meeting scheduled for November 20, 2002. Burton's letter invited them to attend and encouraged them to invite other interested parties.

CCNA members faxed Joe a letter related to the workshop and asked Joe to approach Congressman Sessions. Joe indicated she would send someone to

the meeting to take notes on their concerns and then turn the information over to Sessions. Because Joe was unable to attend the meeting personally, she asked Clark to attend. Clark was to meet Reverend Stovall, Pastor of the Camp Wisdom United Methodist Church of Dallas, in Athens, and accompany him to the meeting.

Bowman, Stovall, Clark, and others attended the City Council workshop to discuss the agreement. Mayor King, the City Council members, and Burton were also present. Jenkins attended the meeting in her capacity as a City Council member.

After the Council meeting, Bowman, Stovall, Clark, and other attendees convened at the house of a CCNA member to discuss their concerns. Clark took notes during this after-meeting. The meeting lasted approximately twenty minutes. Bowman told Clark that Jenkins was controlled by Mayor King and that she was ineffective and failed to communicate the concerns of the citizens of North Athens to the City Council.[3] Joe instructed Clark to take down their complaints and draft a memorandum that would prompt an investigation by Congressman Sessions and DOJ's Civil Rights Division.

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[3] Bowman believed Jenkins was unresponsive to her concerns related to harassment by the Athens Police Department and, more specifically, the death of a North Athens resident. Jenkins indicated that, when she asked Bowman for facts to back up her accusations, Bowman did not provide any information. Jenkins believed that, in some areas of the black community, she was considered an outsider because she would not take unsubstantiated allegations to the City Council. Jenkins testified that Bowman, CCNA, and BCJLO wanted her removed from the City Council.

Clark drove home that night, and the next morning he delivered his memorandum to Joe. Joe testified she prepared a cover page,[4] and the Clark Memorandum was delivered to a staff member at Sessions's office. The Clark Memorandum was also mailed to DOJ's Civil Rights Division. Although it was Joe's practice to scan such a memorandum before it was sent, she only glanced at the Clark Memorandum and did not notice the criminal allegations related to Jenkins.

In paragraph four of the Clark Memorandum, the following statement was made regarding Jenkins:

> The only black female Athens City Council member is Gladys Elaine Blanton Jenkins. She is a convicted felon having served time in Texas and California for Prostitution and Drugs. She is controlled by Mayor Jerry King. No one in the State of Texas can hold elective office who has felony convictions. She must be removed from office immediately.

See Appendix for full text of the Clark Memorandum.

Joe was unconcerned whether the statements in the Clark Memorandum were true or false. Neither Clark, Joe, nor BCJLO performed any investigation to determine the validity of any factual statements contained in the memorandum including the criminal

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[4] Joe testified she slid a loose cover page into the envelopes containing the Memorandum that stated "Summary and accounting of meeting in Athens, Texas on 11-20-02 of the city meeting and after meeting with North Athens Black Citizens of Concern approximately 10 people present." Aside from her testimony, there is no evidence of record of the cover page or its receipt by Sessions or the Department of Justice.

allegations against Jenkins.[5] Joe agreed the memorandum's statements regarding Jenkins were "very defamatory," "horrible," and she "wouldn't want them published about anyone." She also believed the contents of the memorandum were confidential and she was relying on Sessions and the DOJ to determine whether the statements made were true.

Clark did not appear at trial, but testified by deposition. He indicated he had no belief or disbelief as to the truth of the memorandum's contents. He did not know Jenkins and had no belief as to the statements he made about her. He did not know the people who attended the Council meeting and after-meeting, and had no baseline for the veracity of their statements. He stated he recorded the information the attendees supplied to him. He indicated, however, he did not believe the statement in his memorandum that "[t]he Athens Police intimidate, harass and murder black residents on a daily basis." If it was the case, he stated he would have heard about it on television or in a newspaper.

After receiving the Clark Memorandum, Congressman Sessions attempted to learn if there was any truth to the allegation tying Charles Hawn, Sessions's only staff member in the Athens office, to the Ku Klux Klan.[6] Hawn received a call from a Dallas

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[5] Joe testified she could have verified whether the criminal charges alleged against Jenkins were legitimate by performing a public records search which she had performed in the past.

[6] Sessions testified by videotape that his office investigates constituents' complaints. The complaints are typically investigated by his local staff members and are generally carried out by interacting with people and asking questions. He also indicated this type of investigation is separate from his ability to participate in formal investigations initiated by Congress. He

staff member asking if he had seen the Clark Memorandum. Sessions's Dallas office faxed the memorandum to Hawn for comment. Hawn indicated he had no association or knowledge of the BCJLO, Joe, or Clark. He had also never received any complaints from North Athens citizens about a pattern, or instance, of murder or intimidation of black residents by Athens police. He stated he absolutely had no ties to the Ku Klux Klan.

Sessions's office subsequently mailed the original Clark Memorandum to Mayor King and faxed him a copy for his comments. King provided a copy of the memorandum to Burton and Chief Vance. Burton arranged a meeting between King, Jenkins, and Vance to determine whether there was any substance to the charges against Jenkins in the Clark Memorandum. Jenkins was fingerprinted and criminal histories were run by the Athens Police Department and the Texas Rangers. Neither found any criminal history. City Council members also received a copy of the Clark Memorandum, held an Executive Session to discuss its contents and determine what action, if any, the Council should take. The Council decided against taking action.

On February 23, 2003, Jenkins filed this suit against Clark and BCJLO for damages due to defamation and libel. Jenkins's claims were tried to a jury and after a two day trial, the jury returned a verdict against Clark and BCJLO. Jenkins was awarded $300,000 for past and future damages due to mental

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further testified Congressional Committees have the power to issue subpoenas and compel testimony but, as a Congressman investigating a constituent's complaint, Sessions had no subpoena power and could only effectuate change through informal methods.

anguish, injury to character and/or reputation and injury to her standing in the community. She was also awarded exemplary damages of $100,000 against Clark and $100,000 against BCJLO.

At trial, the jury was given the following instruction on the "actual malice" element of Jenkins's cause of action, and they made the following findings:

Question No. 2

Do you find by clear and convincing evidence that Paul Martin Clark and/or Black Citizens for Justice, Law and Order, Inc. acted with actual malice in committing the libel, if any, against Gladys Elaine Blanton Jenkins?

a.	Paul Martin Clark	Yes
b.	BCJLO	Yes

Instruction: Actual malice means the false statement was made with actual knowledge that it was false or with reckless disregard of whether it was false. Reckless disregard means the author actually entertained serious doubts as to the truth of the statement.

"Clear and convincing evidence" which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Discussion

Clark and BCJLO[7] contend Jenkins failed to present clear and convincing evidence of actual

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[7] In its answer to Question No. 3, the jury found BCJLO either authorized, or ratified, Clark to commit libel against

malice to controvert the testimony of Clark and Joe that the truth or falsity of the statements in the Clark Memorandum was never considered. Because Clark never considered whether the statements were true or false, he maintains he could not have entertained *any* doubts as to their truth or falsity. He also asserts his statements were absolutely privileged as a legitimate attempt to petition the government for a redress of grievances under the Texas Constitution article 1, § 27. As such, he would have this Court find his statements are not subject to Texas defamation laws.

Notwithstanding the order in which Clark briefed his issues, logic dictates that we first consider whether his statements are absolutely privileged before proceeding to consider the sufficiency of evidence of actual malice.

I. Right To Petition

A. Absolute Privilege

Clark asserts the statements in his memorandum are subject to an absolute privilege because the Texas Petition Clause provides greater protection for communications made in petitions for redress than exist for those who generally exercise their right to free speech. He contends the Free Speech and Petition Clauses establish separate and distinct constitutional rights, the violation of which requires differing standards for determining liability in

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Jenkins. The jury also found Clark and BCJLO jointly and severally liable for the actual damages of $300,000, and individually liable for their share of exemplary damages, $100,000 each. Neither Clark nor BCJLO raise any issue related to their joint liability nor the jury award of exemplary damages. They also filed a joint notice of appeal. Accordingly, in our Discussion, we will refer to "Clark and BCJLO" collectively as "Clark."

defamation actions. Rather than permit plaintiffs to recover for defamation against a petitioner for redress if they establish "actual malice" under the *New York Times* standard[8] in accord with the United States Supreme Court's holding in *McDonald v. Smith,*[9] Clark would have this Court adopt the *Noerr-Pennington* doctrine created by the United States Supreme Court for use in antitrust cases,[10] and require such plaintiffs to establish the petition itself is a "sham" before liability attaches. In sum, Clark urges this Court to elevate communications under the Petition Clause to "special" First Amendment status and accept his claim of absolute privilege.

The Petition Clause of the Texas Constitution reserves the right to petition the government for a redress of grievances as follows:

> RIGHT OF ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those vested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Texas Const. art. 1, § 27.[11]

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[8] *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

[9] 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985).

[10] Eastern R.R. *Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

[11] Unlike the Texas Constitution, the federal counterpart combines the right to freedom of speech with the right to assemble and petition for redress as follows:

Contrary to Clark's assertion, the right to petition is inseparable from the right of free speech. *Puckett v. State,* 801 S.W.2d 188, 192 (Tex.App.-Houston [14th Dist.] 1990), *cert. denied,* 502 U.S. 990, 112 S.Ct. 606, 116 L.Ed.2d 629 (1991). "Although the rights are distinct guarantees, they were cut from the same constitutional cloth, inspired by the same principles and ideals. Thus, as a general rule, the rights are subject to the same constitutional analysis." *Id.* (citations omitted).

That the Texas Constitution expressly guarantees a right to bring suits for reputational torts and provides access to courts for injuries to reputation, supports the notion that First Amendment speech safeguards should apply to those who petition for redress.[12] Nowhere in the Petition Clause is there

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. 1.

[12] In fact, the Framers of the Texas Constitution first considered an absolute guarantee of free speech and subsequently adopted a provision making communicators responsible for an abuse of the right to free speech. The Texas Supreme Court in *O'Quinn v. State Bar of Texas,* 763 S.W.2d 397, 402 (Tex.1988), observed:

> [t]he original draft of section 4 of the Declaration of Rights of the 1836 Constitution for the Republic of Texas provided: 'No law shall ever be passed to curtail the liberty of speech or the press.' 1 Gammel, Laws of Texas 868 (1898). But, by the time of its adoption the Fourth Declaration of Rights of the Texas Constitution of 1836 stated: Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, *being responsible for the abuse of that privilege.*

Emphasis added.

language that militates against applying these free speech safeguards to petitioners, or that supports any "special" First Amendment status for petitioners.[13] Rather, defamation defendants seeking greater protection than that offered by the Texas and United States Constitutions must look to Texas common law. The Texas Supreme Court has observed:

[a]lthough we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that 'broader protection, if any, cannot come at the expense of a defamation claimant's right to redress.' Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts. The Texas Constitution's free speech provision guarantees everyone the right to 'speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege.*' Likewise, the Texas Constitution's open courts provision guarantees that '[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or *reputation,* shall have remedy by due course of law.' While we have occasionally extended

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[13] When interpreting the Texas Constitution, we "rely heavily on its literal text and must give effect to its plain language."

Stringer v. Cendant Mortgage Corp., 23 S.W.3d 353, 355 (Tex.2000); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997). Clark contends the three words-"or other purposes"-somehow expands the Petition Clause to protect statements by petitioners with an "absolute privilege." However, we interpret these three words as modifying the phrase "for redress of grievances" to include petitions for "purposes other" than the "redress of grievances." The phrase "or other purposes" does not speak or relate to the granting of any special privileges or protections for those who exercise their rights under the Petition Clause.

protections to defamation defendants greater than those offered by the United States Constitution, we have based these protections on the common law, not the Texas Constitution.

Bentley v. Bunton, 94 S.W.3d 561, 578 (Tex.2003)*quoting Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116-17 (Tex.2000) (emphasis in original).

Thus, unless Texas common law creates an exception, persons who exercise their right to petition do so in the absence of absolute immunity and may be held liable for their communications if the plaintiff is able to make a showing sufficient to satisfy the *New York Times* standard for "actual malice." We also find the United States Supreme Court's holding in *McDonald v. Smith*, persuasive and agree that, although "[t]he right to petition is guaranteed, the right to commit libel with impunity is not." 472 U.S. at 485, 105 S.Ct. at 2790.

In *McDonald,* the plaintiff was a candidate for appointment as a United States Attorney. The defendant sent defamatory letters to various federal governmental officials, including President Reagan, concerning the plaintiff's ethical qualifications to serve as United States Attorney. Based upon those communications, the plaintiff sued for defamation. The defendant argued the Petition Clause of the First Amendment, which guarantees "the right of the people . . . to petition the Government for a redress of grievances," should provide him with absolute immunity. *Id.* The Court disagreed, noting that "[u]nder state common law, damages may be recovered only if [the defendant] is shown to have acted with malice. . . ." *Id.* The Court held that requiring plaintiffs to show actual malice was sufficient protection for petitioners, and "the Petition Clause

does not require the State to expand this privilege into an absolute one." *Id.*

The *McDonald* ruling is compatible with Texas common law which recognizes two classes of privileges-absolute and qualified-either of which may apply to a petition for redress. Two cases are illustrative. In *Koehler v. Dubose,* 200 S.W. 238 (Tex.Civ.App.—San Antonio 1918, writ ref' d), the court considered allegations of libel contained in letters addressed to the state comptroller related to the issuance of a new liquor license to the plaintiff. The letters accused the plaintiff of selling alcohol to minors through others and petitioned the state comptroller, who had authority to grant, revoke, or refuse licenses to sell intoxicating liquor, to refuse to issue a new license. The court recognized that, under the common law, there were two classes of privilege that might apply to petitioners' communications-absolute and qualified. *Id.* at 242. After finding the letters were not part of a judicial proceeding and subject to an absolute privilege, the court found the communications were subject to a qualified privilege and stated, "the publishers of the statements will be guilty of libel if it be shown that the accusations were made in bad faith and with malice towards appellant." *Id.* at 243.

In *Connellee v. Blanton,* 163 S.W. 404 (Tex.Civ.App.—Fort Worth 1913, writ ref' d), the court extended the absolute privilege recognized under the common law for statements made in judicial proceedings to petitions to the Governor requesting pardons. In *Connellee,* plaintiff's petition, a letter applying to the Governor for a pardon, complained that a district judge had changed the venue of the defendant's case for the purpose of making the

costs excessive. *Id.* at 405. The *Connellee* court also recognized two classes of privilege, qualified and absolute, that might apply but determined the petition was subject to an absolute privilege because it was an extension of the judicial proceedings whereby the person sought to be pardoned was convicted. *Id.* at 407. The *Connellee* court held:

> [t]he same principle of public policy which supports the absolute privilege extended to judicial proceedings applies with equal force in favor of petitions to the Governor of the state for the exercise of the pardoning power, a power superior to that of the court which rendered the judgment of conviction. If the judicial proceedings which culminated in the conviction were absolutely privileged, why should not the same immunity be extended to the petition to a higher power to annul that judgment, in part?

Id.

Thus, the courts' rulings in *Koehler* and *Connellee* on the issue of whether a petition is subject to an absolute or qualified privilege under the common law turned on whether the petition was submitted in connection with a judicial proceeding. The *Koehler* court recognized the principle that, at a minimum, all petitions are subject to a qualified privilege under the common law, and *Connellee* recognized an absolute privilege where the petition is submitted as an extension of a judicial proceeding.[14] Neither court

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[14] *Hott v. Yarborough*, 112 Tex. 179, 245 S.W. 676 (Tex.Comm'n App.1922, judgm't adopted), also cited by Clark, is similar to *Connellee*. In *Hott*, the court held that the contents of a letter to a grand jury foreman were absolutely privileged because communications to the grand jury in the regular

recognized an absolute privilege[15] for all communications under the Petition Clause.

Accordingly, when a person exercises their constitutional right to petition for redress, their communications may be subject to an absolute privilege or qualified privilege depending on the context, or occasion, in which their communication is made. *See Koehler*, 200 S.W. at 242-43. An absolute privilege is analogous to an immunity because absolutely privileged communications are not actionable and may not form the basis for civil liability, *Reagan v. Guardian Life Ins., Co.*, 140 Tex. 105, 166 S.W.2d 909, 911 (1942);

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performance of its duties were subject to the common law rule applicable to judicial proceedings. *Id.* at 678.

That the *Hott* court cites to a Vermont Supreme Court case, *Harris v. Huntington*, 2 Tyl. 129, 1802 WL 777, (Vt.1802), for a general discussion of the scope of absolute privileges is not persuasive authority that the *Hott* court intended to extend an absolute privilege to all petitioners. In *Harris*, the Vermont Supreme Court extended an absolute privilege to a petition addressed to the Vermont Legislature asking the legislative convention not to reappoint a particular Justice of the Peace. In *Harris*, the Vermont House of Representatives was empowered by its Constitution to impeach state criminals and acted as the "grand inquest of the State to charge such criminals." As such, the Vermont Legislature acted in a capacity similar to that of a grand jury determinating whether to issue indictments.

[15] *Wood v. State*, 577 S.W.2d 477 (Tex.Crim.App.1978), also cited by Clark, is anomalous. In *Wood*, the defendant challenged the constitutionality of the Penal Code provision making it a crime to file a false police report under the Petition Clause. The officer who was the subject of her complaint did not bring an action for defamation. Moreover, the court decided the case on the sufficiency of the evidence under the Penal Code provision making it a crime to file a false police report, ignored any constitutional issues, and tied its ruling to the case. *Id.* at 480 n. 2.

Randolph v. Walker, 29 S.W.3d 271, 278 (Tex.App.-Houston [14th Dist.] 2000, pet. denied), even though the communication is false and published with express malice. *Associated Telephone Directory Publishers, Inc. v. Better Business,* 710 S.W.2d 190, 192 (Tex.App.-Corpus Christi 1986, writ ref'd. n.r.e.). This privilege attaches to communications made in proceedings of legislative, executive, and judicial bodies, *Zarate v. Cortinas,* 553 S.W.2d 652, 654 (Tex.Civ.App.-Corpus Christi 1977, no writ), and to only a limited and select number of situations which involve the administration of the functions of the branches of government such as the opinions of judges and the speeches of members of congress or legislatures. *Hurlbut v. GulfAtlantic Life Insurance Co.,* 749 S.W.2d 762, 768 (Tex. 1987); *Knapp & Co. v. Campbell,* 14 Tex.Civ.App. 199, 36 S.W. 765, 767 (Tex.Civ.App.-El Paso 1896, no writ).

Absolute privilege attaches to all communications published in the course of judicial proceedings, *IBP, Inc. v. Klumpe,* 101 S.W.3d 461, 470 (Tex.App.—Amarillo 2001, pet. denied), and similarly applies to quasi-judicial proceedings before executive officers, boards, or commissions. *Reagan,* 166 S.W.2d at 912; *5-State Helicopters, Inc. v. Cox,* 146 S.W.3d 254, 256-57 (Tex.App.-Fort Worth 2004, pet. denied). To apply, the executive officer, board, or commission must exercise quasi-judicial powers. *Putter v. Anderson,* 601 S.W.2d 73, 76 (Tex.Civ.App.—Dallas 1980, writ ref'd. n.r.e.). That is, the governmental entity must have the authority to investigate and decide the matters at issue, *5-State Helicopters, Inc.,* 146 S.W.3d at 259; *Crain v. Smith,* 22 S.W.3d 58, 60-61 (Tex.App.—Corpus Christi 2000, no pet.); *Lane v. Port Terminal R.R. Ass'n,* 821 S.W.2d 623, 625 (Tex.App.—Houston [14th Dist.] 1991, pet. denied),

and the communication must bear some relationship to a pending or proposed judicial proceeding in order for the absolute privilege to apply. *Bennett v. Computer Assocs. Int'l., Inc.*, 932 S.W.2d 197, 201 (Tex.App.—Amarillo 1996, writ denied).[16]

Clearly, all communications to public officials are not absolutely privileged. *Hurlbut*, 749 S.W.2d at 768. Initial communications "to a public officer . . . who is authorized or privileged to take action" are subject to only a qualified privilege, not absolute immunity. *Id.* The filing of a criminal complaint is not absolutely privileged because, at that point, no judicial proceedings have been proposed and no investigating body has discovered sufficient information to present to a grand jury or file a misdemeanor complaint. *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 99 (Tex.App.—San Antonio 2003, pet. denied). *See Caller Times Pub. Co. v. Chandler*, 122 S.W.2d 249, 251 (Tex.Civ.App.—San Antonio 1938), *aff'd*, 134 Tex. 1, 130 S.W.2d 853 (1939) (confessions under oath to a district attorney implicating plaintiff in the commission of a crime not absolutely privileged); *Houston Chronicle Pub. Co. v. Tiernan*, 171 S.W. 542, 546 (Tex.Civ.App.—Galveston 1914, no writ) (affidavits alleging attorneys committed crimes were not absolutely privileged). Thus, the initial communication of alleged wrongful or illegal acts to an official authorized to protect the public from such

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[16] Examples where the privilege has been held to apply include statements made in correspondence sent, and conferences convened, in anticipation of litigation; in pretrial hearings, depositions, affidavits, pleadings or papers filed in the case; pleadings delivered to the media and settlement letters sufficiently connected with a pending or potential suit. *Bennett*, 932 S.W.2d at 201

acts is subject to a qualified privilege. *See Hurlbut*, 749 S.W.2d at 767-68 (criminal allegations made to assistant attorney general not absolutely privileged); *Zarate*, 553 S.W.2d at 655.

This common law "qualified privilege" has been described as follows:

> [q]ualified privileges against defamation exist at common law when a communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication. *See Holloway v. Texas Medical Ass'n*, 757 S.W.2d 810, 813 (Tex.App.—Houston [1st Dist.] 1988, writ denied). A communication may also be conditionally privileged if it affects an important public interest. *See generally* Bruce W. Sanford, Libel and Privacy, at 701-94.1 (collecting libel privilege statutes from all fifty states).

Cain v. Hearst Corporation, 878 S.W.2d 577, 582 (Tex. 1994).

Unlike an absolute privilege, this "conditional privilege is defeated when the privilege is abused," *Hurlbut*, 749 S.W.2d at 768, and the "qualifying criterion . . . is that the statements must be made in good faith and without malice." *Zarate*, 553 S.W.2d at 655 (collected cases cited). To hold otherwise would "unnecessarily deny those innocent victims of maliciously or recklessly filed complaints an opportunity to seek remuneration for their injury." *Id.* In making a determination whether statements are subject to a qualified privilege, courts must examine the "occasion" of the communication, *i.e.*, the totality of the circumstances including the communication itself, its communicator, its recipient and the relief sought.

Cranfill v. Hayden, 22 Tex.Civ.App. 656, 55 S.W. 805, 809 (Tex.Civ.App.—Dallas 1900, no writ).[17] And, the question of privilege is ordinarily one of law for the court. *Denton Publishing Co. v. Boyd,* 460 S.W.2d 881, 884 (Tex. 1970).

Clark addressed his Memorandum to Congressman Sessions and DOJ's Civil Rights Division. By his Memorandum, Clark generally sought to instigate an investigation of alleged civil rights violations in Athens and, more specifically, Jenkins's immediate removal from the Athens City Council. As such, the Clark Memorandum was a preliminary report, not communicated to Congressman Sessions as part of a legislative proceeding. Moreover, Congressman Sessions lacked the subpoena power necessary to conduct a formal investigation as well as the authority to grant the ultimate relief sought by Clark. At best, the Congressman could make calls, gather information, and refer Clark's allegations to public officials and/or agencies empowered to investigate, litigate, or adjudicate Clark's complaints. Congressman Sessions's ability to gather information and refer matters to the appropriate authorities does not constitute a "legislative proceeding." *See A.H. Belo & Co. v. Wren,* 63 Tex. 686, 1884 WL 8996, *26-27 (Dec. 19, 1884). Thus, Clark's statements to Congressman Sessions were not part of a legislative proceeding and were not subject to an absolute privilege. Neither were Clark's

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[17] This is an objective test. Whether Clark and/or Joe "believed" that Sessions and/or DOJ were under a duty to keep their communications confidential or their communications were absolutely privileged, is irrelevant. We also note the Memorandum contains no language, legends, or banners indicating the information contained therein was, or should be treated as, confidential.

statements to DOJ's Civil Rights Division communicated in an executive, judicial, or quasi-judicial proceeding.

A privilege "is an affirmative defense to be proved and is in the nature of confession and avoidance." *IBP, Inc.*, 101 S.W.3d at 471. As such, Clark had the burden of establishing this affirmative defense to defamation. *Id.* Clark produced no evidence indicating DOJ was actively contemplating, investigating, or litigating any civil rights violations related to Athens. In addition, Clark's allegations were preliminary in nature, *i.e.*, designed to launch an investigation that might lead to legal action. Thus, Clark's statements to DOJ were not part of an executive, judicial, or quasi-judicial proceeding, and were not subject to an absolute privilege.

Under Texas common law, damages for defamation and libel may be recovered only if a defendant is shown to have acted in bad faith with malice. *Zarate*, 553 S.W.2d at 655; *Koehler*, 200 S.W. at 243. This standard is consistent with that expressed by the United States Supreme Court in *New York Times, supra*, and is applicable to a plaintiff's claims against those who have exercised their First Amendment right under the Petition Clause. *McDonald*, 472 U.S. at 485, 105 S.Ct. at 2791. *See generally Dixon v. Southwestern Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *Little v. Bryce*, 733 S.W.2d 937, 945 (Tex.App.—Houston [1st Dist.] 1987, [no writ]. While we recognize the Petition Clause is undoubtedly an important part of self-government, one person's right to petition, in the absence of a common law privilege that is absolute, ends where his neighbor's reputational rights begin. Like the *McDonald* court, we are not prepared to conclude that the Petition

Clause "include[s] an unqualified right to express damaging falsehoods in exercise of that right." 472 U.S. at 484, 105 S.Ct. at 2790.

We also decline to apply the "sham exception" doctrine established by the United States Supreme Court for antitrust litigation, *i.e.*, the *Noerr-Pennington* doctrine. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80, 111 S.Ct. 1344, 1353-54, 113 L.Ed.2d 382 (1991). The *Noerr-Pennington* doctrine basically holds that petitioning the government to take anticompetitive action does not violate antitrust laws. *Id.* The *Omni* court described the doctrine as follows:

> [a] classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.

Id.

The *Noerr-Pennington* doctrine has no application here. Jenkins filed suit for defamatory statements made in a memorandum intended to instigate an investigation by the federal government and thereby result in her removal from office. Jenkins did not sue Clark for improperly attempting to influence governmental decision-making or obtain an unlawful economic result, *i.e.*, anticompetitive action. We recognize, as did the *Omni* Court, that the *Noerr-Pennington* doctrine is "tailored . . . for the business world," *id.*, and find the United States Supreme Court's holding in *McDonald* to be apropos.[18] Having

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[18] Likewise, *United States v. Hylton*, 558 F.Supp. 872 (D.C.Tex.1982), *aff'd*, 710 F.2d 1106 (5th Cir.1983), is of no assistance to Clark's appeal. In *Hylton*, the defendant sought an

concluded the statements in the Clark Memorandum are subject to a qualified privilege permitting liability in a defamation action if his statements were made with actual malice, we may now consider his contention that Jenkins failed to prove actual malice by clear and convincing evidence

II. Actual Malice

A public figure may not recover damages for a defamatory falsehood without clear and convincing proof the false statement was made with "actual malice," *i.e.*, with knowledge the statement was false or with reckless disregard of whether it was false or not. *Doubleday & Co., Inc. v. Rogers,* 674 S.W.2d 751, 755 (Tex.1984); *New York Times Co.,* 376 U.S. at 279-280, 84 S.Ct. at 726. Although a bright line definition of "clear and convincing evidence" for purposes of determining actual malice does not exist, the phrase has been used to mean evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations to be established, or evidence sufficient to support a firm conviction that the fact to be proved is true. *Bentley,* 94 S.W.3d at 596-97; *Huckabee v. Time Warner Entertainment Co.,* 19 S.W.3d 413, 422 (Tex.2000).

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acquittal on federal charges of attempting to intimidate and impede an IRS investigation. After defendant filed a criminal complaint against two IRS agents, the IRS filed an action claiming defendant filed her complaint intending to obstruct an IRS investigation rather than assert her own rights. *Id.* at 874. No one alleged a claim for defamation. Rather, the IRS alleged the defendant attempted to utilize legal processes to attain an improper result. Here, Jenkins does not assert Clark improperly petitioned Congressman Sessions and DOJ, but that Clark defamed Jenkins in the process.

Knowledge that the statement is false is a "relatively clear standard; reckless disregard is much less so." *Bentley,* 94 S.W.3d at 591. Reckless disregard is a subjective standard focusing on the declarant's belief in, or attitude toward, the truth of the communication at issue. *New Times v. Isaacks,* 146 S.W.3d 144, 165 (Tex.2004). The standard requires more than a departure from conduct that is reasonably prudent. Mere negligence is not enough. *Bentley,* 94 S.W.3d at 591. There must be evidence the defendant made the false publication with a high degree of awareness of probable falsity, or entertained serious doubts as to the truth of his publication. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 667, 109 S.Ct. 2678, 2686, 105 L.Ed.2d 562 (1989). For instance, a failure to investigate by itself does not evidence a reckless disregard for the truth, but evidence that a failure to investigate was contrary to the speaker's usual practice and motivated by a desire to avoid the truth may demonstrate the reckless disregard necessary for a finding of actual malice. *Bentley,* 94 S.W.3d at 591.

While recognizing that the test for reckless disregard "may be said to put a premium on ignorance, encourage the irresponsible publisher not to inquire, and permit the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity," *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968), the United States Supreme Court has cautioned that:

> [t]he defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements

> were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id.

In addition, although courts must be careful not to place too much reliance on factors such as motive, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. *Bentley,* 94 S.W.3d at 591; *Harte-Hanks,* 491 U.S. at 668, 109 S.Ct. at 2685. A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered. *Bentley,* 94 S.W.3d at 596. Moreover, although an understandable misinterpretation of ambiguous facts does not show actual malice, inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. *Hearst Corp. v. Skeen,* 159 S.W.3d 633, 638 (Tex.2005). Actual malice may be inferred from the "relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the defendant's words or acts before, at, or after the time of the communication."

Dolcefino v. Turner, 987 S.W.2d 100, 111-12 (Tex.App.-Houston [14th Dist.] 1998), *aff'd,* 38 S.W.3d 103 (Tex.2000).

In *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), the United States Supreme Court held that judges have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity" in defamation suits brought by public officials. 466 U.S. at 514, 104 S.Ct. at 1967. In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full, *Harte-Hanks,* 491 U.S. at 688, 109 S.Ct. at 2696, and determine whether the evidence in the record is sufficient to support a finding of actual malice as a matter of law. *Bentley,* 94 S.W.3d at 597-98.

In making credibility determinations the reviewing court must make an independent examination of the statements at issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. *New York Times Co.,* 376 U.S. at 285, 84 S.Ct. at 728-29. Where the credibility of witnesses is a factor in determining whether the constitutional standard has been satisfied, "the First Amendment does not forbid any deference to a fact finder's determinations; it limits that deference." *Bentley,* 94 S.W.3d at 598.[19] The findings the jury must have

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[19] In *Bentley,* the Texas Supreme Court observed:

> [i]f the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own favor. His assertions as to his own state of mind, if they could not be disbelieved on appeal, would surely

made to reach its verdict are considered alongside the undisputed evidence to determine whether the plaintiff has met its burden of proof on the element of actual malice. *Harte-Hanks,* 491 U.S. at 690-91, 109 S.Ct. at 2678.

Thus, we follow the approach set forth in *Bentley* and *Harte-Hanks.* First, we begin with a determination of the evidence the jury must have found incredible. *Bentley,* 94 S.W.3d at 599. If the fact finder chose to disregard the defendant's testimony, so must we, so long as the jury's credibility determinations are reasonable. *Id.* However, "it is not enough for the jury to disbelieve defendant's testimony," *Casso v. Brand,* 776 S.W.2d 551, 558 (Tex.1989), the credible evidence must rise to the level of clear and convincing. *Bentley,* 94 S.W.3d at 599. Thus, once we have resolved credibility determinations in favor of the jury's verdict, we must independently evaluate the statements at issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect. *Turner,* 38 S.W.3d at 120. We then identify the undisputed facts and make a determination whether the "undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice." *Bentley,* 94 S.W.3d at 599.

> prevent proof of actual malice by clear and convincing evidence absent a 'smoking gun'-something like a defendant's confession on the verge of making a statement that he did not believe it to be true. The First Amendment does not afford even a media defendant such protection.

94 S.W.3d at 597.

A. Evidence The Jury Found Not Credible

The jury's finding that Clark acted with actual malice does not differentiate whether Clark had actual knowledge the statements regarding Jenkins were false or acted with reckless disregard of whether the statements were false, but we know, based upon the definition of actual malice given to the jury, that it was one or the other. That said, the jury's finding supports an inference that the jury believed, by clear and convincing evidence, that Clark either knew the statements were false, or he actually entertained serious doubts as to the truth of the statements.

Neither Clark nor Joe offered any evidence that they believed the statements were true or made in good faith at the time they were published.[20] Rather, Clark and Joe testified the statements were published without a point of reference that would assist them in determining the veracity of their sources or the truthfulness of the statements about Jenkins, and performed no investigation to determine the accuracy of the information.

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[20] Clark contends that Congressman Sessions's testimony supports a finding that Clark acted in good faith. Although Sessions testified that he believed Clark acted in good faith, he also testified he read only the portion of the Clark Memorandum in which he and his office were named; he believed he had met Clark briefly once; and he could not testify whether Clark acted in good faith in connection with his involvement in Athens in November 2002. Congressman Sessions's testimony regarding Clark's good faith is equivocal at best and largely irrelevant because the actual malice test is a subjective one that focuses on the defendant's state of mind. *See New Times*, 146 S.W.3d at 162; *Bentley*, 94 S.W.3d at 591.

In essence, Clark testified he was just a scrivener. He stated he simply wrote down, or recorded, what was said by the attendees at the Council meeting and gathering afterwards. He had no belief or disbelief as to the truth of the statements contained in his Memorandum. He had no basis for believing or disbelieving the speakers at the meeting. If the jury determined Clark knew the statements were false, Clark's testimony must be ignored. *Bentley,* 94 S.W.3d at 599. To the extent the jury determined that Clark actually entertained serious doubts as to the truth of the statements, his testimony must also be ignored. *Id.*

Clark also identified Barbara Bowman as a person at the after-meeting who told him Jenkins was a convicted felon and served time in Texas and California for prostitution and drugs. To the contrary, Barbara Bowman testified at trial in the plaintiff's case-in-chief that Fred Burke told Clark that Jenkins had engaged in drugs and prostitution in California, but said nothing about Texas, Jenkins serving time in prison, or being convicted. Bowman unequivocally testified no one at the meeting accused Jenkins of being a convicted felon. Clark did not appear at trial. Rather, Clark's deposition testimony was read. Neither did Clark's counsel call Burke to testify. Given the jury's finding regarding actual malice, we ignore Clark's testimony and find the jury determined Bowman's testimony to be credible.

B. The Clark Memorandum

The Clark Memorandum falsely stated that Jenkins was "a convicted felon having served prison time in Texas and California for Prostitution and Drugs." The Memorandum was addressed to a United States Congressman and DOJ's Civil Rights Division. Based

upon this statement, Clark unequivocally demanded Jenkins "be removed from office immediately."

The law does not allow someone the unrestricted right to publish statements about public officials that are untrue, and in upholding this principle the courts of this State have held that, "[a]s a general rule a publication concerning a public officer, in order to be libelous per se, must be of such a character as, if true, would subject him to removal from office." *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 228 S.W.2d 499, 503 (1950); *Rawlins v. McKee*, 327 S.W.2d 633, 637 (Tex.Civ.App.—Texarkana 1959, writ ref'd. n.r.e.) (collected cases cited therein); *see*50 Tex.Jur.3d *Libel and Slander* § 34 (2000); *Marshall v. Mahaffey*, 974 S.W.2d 942, 949 (Tex.App.-Beaumont 1998, pet. denied); *Houston Chronicle Pub. Co. v. Flowers*, 413 S.W.2d 435, 438 (Tex.Civ.App.—Beaumont 1967, no writ). Libel *per se* means the written or printed words are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable. *Morrill v. Cisek*, 226 S.W.3d 545, 549-50 (Tex.App.—Houston [1st Dist.] 2006, no pet.).

Having considered the statement in issue and the circumstances under which it was made, we find that the Clark Memorandum is not of a character that should receive protection under the principles of the First Amendment. "The Constitution seeks to secure liberty and not licentiousness." *Koehler*, 200 S.W. at 244.

C. Clear and Convincing Proof of Actual Malice

A plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. *Bentley*, 94 S.W.3d at 591; *Harte-Hanks*, 491 U.S. at 668, 109

S.Ct. at 2685. In general, the Texas and United States Supreme Courts recognize three types of circumstantial evidence that would likely support a finding of actual malice: (1) where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified, anonymous account; (2) when the allegations made are so inherently improbable that only a reckless man would have put them in circulation; and (3) there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Bentley,* 94 S.W.3d at 596; *St. Amant,* 390 U.S. at 732, 88 S.Ct. at 1326. The Clark Memorandum must also be construed as a whole, in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *See Turner,* 38 S.W.3d at 114; *Wood v. Dawkins,* 85 S.W.3d 312, 317 (Tex.App.—Amarillo 2002, pet. denied).

Our analysis begins with the origination of the Clark Memorandum. Clark testified he took notes at the after-meeting and simply recorded what the attendees stated. He testified that everything in his Memorandum originated with statements people made at the after-meeting. Clark also testified he was trained as a federal records management officer to objectively record events, and Joe testified Clark was sent to Athens because of his detailed note-taking abilities. Furthermore, Clark testified he had no belief or disbelief regarding his statement about Jenkins.

We have already determined that the jury's answer to the charge indicates that they disbelieved Clark's testimony that he had no belief or disbelief as to the truth or falseness of his statement about Jenkins and that they could have believed Bowman's testimony that Clark did not learn all of the information

contained in his statement about Jenkins at the after-meeting. Therefore, relying on Bowman's testimony and Clark's testimony that his information came *only* from statements at the after meeting, the jury could have inferred he "made up" or "imagined" the facts underlying his statement related to Jenkins. We find this inference reasonable and supported by the evidence.

Clark and Joe testified Clark was dispatched to Athens to take notes of what transpired and draft a memorandum to prompt an investigation by Congressman Sessions and DOJ. The Clark Memorandum is clearly an "action" memorandum, *i.e.,* an advocacy document designed not only to prompt an investigation, but to remove Jenkins from office immediately. Nowhere in the Memorandum are the facts or information described as merely the recordation of statements made during meetings of Athens's city government or its concerned citizens. Rather, Clark describes himself as an eyewitness in attendance at the City Council workshop and, with the exception of one paragraph,[21] his factual recitations and opinions are wholly unqualified. The Clark Memorandum's authoritative tone, unqualified language, use of the first person, formal format, and author's signature line, give the appearance Clark is writing with some command of the facts underlying his discrimination claims. Regardless whether Clark was

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[21] In paragraph three of the Clark Memorandum, Clark qualifies his accusation that the staff of Congressman Sessions's Athens office have ties to the Ku Klux Klan with the statement "there is a perception on the part of these citizens that. . . ." This qualification indicates Clark at least considered the need to qualify certain language in the Memorandum and either believed additional qualification was unnecessary or chose not to qualify other statements.

simply a note-taker at the Athens meetings, when he returned to Dallas and drafted the memorandum, he plainly became an advocate for an investigation in Athens and Jenkins's removal from office. [22]

Moreover, there was substantial testimony at trial that a significant number of additional allegations in the Clark Memorandum were untrue and Clark's "eyewitness account" of the City Council workshop was a gross is representation of the events that transpired[23]. The uncontroverted testimony indicated it was not true that: black people were being murdered on a daily basis in Athens; a black man was killed by the Athens police some three weeks prior to the Clark Memorandum; a black woman was tortured by the Athens Police Department and denied medical care; Vance was at the helm of the Garland Police Department when a racial incident occurred; Athens recruited its new police chief because of his racist credentials; peaceful picketing was not allowed in Athens; and picketers were harassed.

Regarding Clark's "eyewitness account" of what transpired at the City Council workshop, the uncon-

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[22] Regardless whether the jury found Joe's testimony related to the cover page credible, the test for "actual malice" focuses on Clark's "belief in, or attitude toward, the truth of the communication at issue." Accordingly, we focus on Clark's subjective belief at the time he made the statements, not Joe's subsequent actions.

[23] At trial, Jenkins produced a number of witnesses that corroborated her evidence: Charles Hawn (regional district office manager for Congressman Sessions), Pam Burton (Athens City Administrator), Elaine Jenkins (City Council person and plaintiff), and Jerry King (former Mayor of Athens). Clark did not appear at trial and did not call any members of the CCNA or other witnesses who attended the City Counsel workshop or after-meeting to rebut the testimony of Jenkins's witnesses.

troverted testimony indicated it was not true that the Mayor told *only* black people to leave the meeting; the Mayor vented extreme hatred by telling the black attendees he did not appreciate the attendance of outsiders; black citizens were refused copies of the minutes of the meeting; the workshop never took place and was a mere future agenda item; only three people were allowed to speak at the workshop; workshop only lasted nine minutes; and black citizens were told to meet with the new police chief individually, not as a group.

Thus, the uncontroverted evidence indicates Clark purposefully drafted an incendiary instrument designed to prompt an investigation in Athens and remove Jenkins from office. Given the gross discrepancies regarding Clark's account of what transpired at the City Council workshop and apparently false allegations and statements contained in his Memorandum, a jury could readily infer that Clark misrepresented facts and stated false allegations and opinions in order to attain his predetermined goals. This includes embellishing Burke's allegations related to Jenkins to include convictions as well as imprisonment in multiple states. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed.2d 447 (1991) (deliberate alteration of a statement resulting in a material change in the meaning conveyed by the statement is proof of reckless disregard); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253, 95 S.Ct. 465, 470-71, 42 L.Ed.2d 419 (1974) (where reporter fabricated and imagined false facts for purposes of bolstering theme of feature article, jury was "plainly justified" in finding that reporter portrayed the Cantrells in a false light through knowing or reckless untruth); *Carson v. Allied News Company*, 529 F.2d 206, 213 (7th

Cir.1976) (defendants, in fabricating and imagining facts, necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness of their probable falsity).

In reaching our conclusion, we find two cases instructive. In *Cantrell*, a reporter was writing a feature article discussing the impact upon a family whose father died in a well-documented bridge collapse. 419 U.S. at 247, 95 S.Ct. at 467. The reporter visited the Cantrell's residence where he interviewed Cantrell's children. Although Mrs. Cantrell was not at home, his article contained a description of her demeanor as well as a statement attributed to her. The article also contained significant misrepresentations pertaining to the dilapidated state of the Cantrell home and their poverty condition. Based upon these facts, the *Cantrell* Court affirmed a jury finding and appellate determination that the reporter and his publisher had "published knowing or reckless falsehoods about the Cantrells." 419 U.S. at 252-53, 95 S.Ct. at 470.

In *Guam Federation of Teachers, Local 1581, of the American Federation of Teachers v. Ysrael*, 492 F.2d 438 (9th Cir.1974), *cert. denied*, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974), the defendant caused various defamatory statements concerning a Union and its officers opposed to his appointment to a school board to be published in a newspaper. The court determined that the defendant's testimony at trial as an adverse witness was sufficient alone to get the plaintiffs to the jury under the *New York Times* standard and described his testimony as follows:

> [h]e repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing,

> to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or nothing at all. He simply asserted that he believed what he said was true.

Id. at 439.

Given the facts presented at trial, the jury could have reasonably inferred that Clark either falsely reported the information he received about Jenkins at the after-meeting, or imagined additional facts he was not told to further his purpose of seeking an investigation of her past activities or immediate removal from office. This inference is reasonable under circumstances where the Clark Memorandum itself is riddled with numerous other falsehoods, misrepresentations, and innuendoes designed to achieve his predetermined result.

Like the defendant in the *Guam Federation* case, Clark also repeatedly admits he did not know whether the statements related to Jenkins were true; he did nothing to verify the alleged criminal convictions and knew of no facts to support the statements. According to Clark, he relied on the word of complete strangers who were interested parties with whom he had no reference for determining the veracity of what they were telling him about a person he had never met. Although the defendant in *Guam Federation* at least testified he believed his statements to be true, Clark testified he had no belief, good faith or otherwise, in the truth of his statements about Jenkins. The behavior exhibited by Clark is more than reckless disregard of the truth or falsity of the information he published-it is simply *no* regard.

Putting aside for a moment the evidence indicating Clark "made up" or "imagined" the information, the jury's verdict is also buttressed by the "inherently improbable" nature of the statements in the Clark Memorandum, *i.e.,* an elected, sitting official had earlier been convicted and imprisoned in two states for crimes related to drugs and prostitution. This is even more so where one of the crimes allegedly committed was in the very state where the person is serving office, and the validity of the claims could be easily determined by a public records search. *See Burger v. McGilley Memorial Chapels, Inc.,* 856 F.2d 1046, 1052 (8 th Cir.1988) (jury could find employer did not rely in good faith on employee's statement easily refutable either by confronting the former employee or making a simple check of the employer's records).

All this, in addition to Clark's departure from his training and past performance as a detailed, objective note taker and the fact that Clark did not perform a simple public records check despite his apparent disbelief regarding the extreme allegations being made about the routine murder of black citizens in Athens coupled with the complete absence of any information regarding the veracity of his sources, provide more than adequate support for a finding of actual malice by clear and convincing evidence. *See Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2nd Cir.1969), *cert. denied,* 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970), *reh'g denied,* 397 U.S. 978, 90 S.Ct. 1085, 25 L.Ed.2d 274 (1970) ("[r]epetition of another's words does not release one of responsibility if the reporter knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports").

Clark asserts this case is most similar to *St. Amant v. Thompson.* In *St. Amant,* a candidate for public office, the defendant, St. Amant, made a televised speech in which he quoted a statement from a single source, Albin, who indicated that the plaintiff, Thompson, had engaged in criminal activity. The Supreme Court determined there was nothing in the record to indicate any awareness by the defendant of the probable falsity of the source's statement and that a failure to investigate alone does not itself establish bad faith. 390 U.S. at 732-33, 88 S.Ct. at 1326. At first blush these facts appear somewhat similar to our own.[24] There is, however, a defining difference between *St. Amant* and this case. Here, none of the statements made to Clark at the after-meeting had any indicia of truthfulness because, according to his testimony, Clark had absolutely no reference to judge the veracity of any statement he received. On the other hand, in *St. Amant,* the defendant had substantial evidence upon which he could judge the veracity of his source:

> St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met with members of the dissident Team-

---

[24] In *St. Amant,* the facts were as follows:

> St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

390 U.S. at 730, 88 S.Ct. at 1325.

> sters faction. St. Amant testified that he had verified other aspects of Albin's information and that he had affidavits from others. Moreover Albin swore to the answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute.

390 U.S. at 733, 88 S.Ct. at 1326-27.

At best, Clark repeated in writing a false, scandalous rumor consisting of trumped up felony charges, convictions, and imprisonment in furtherance of removing Jenkins from office. At worst, Clark made up or imagined the felony charges, convictions, and imprisonment of Jenkins to further a predetermined result. In either instance, Jenkins has established Clark acted with "actual malice" by clear and convincing evidence.

Conclusion

Clark's sole issue and the subparts thereto are overruled. Accordingly, we affirm the judgment of the trial court.

QUINN, C.J., concurring in result only.

Appendix

DATE: Thursday, November 20, 2002

MEMORANDUM FOR: Ms. Daisy Evella Joe,
CEO, B. C.J.L.O. Incorporated

The Honorable Pete Sessions, United States Representative

United States Department Of Justice-Civil Rights Division

REASON: Murder and Intimidation of Black Citizens in Athens, Texas (Henderson County)

FROM: Paul Martin Clark, President, B.C.J.L.O. Incorporated

The City of Athens, Texas (Pam Burton-Athens City Manager) extended an invitation to the Blacks in North Athens to discuss a pattern of murders and intimidation of Athens Black Residents by the Police Force of Athens. The Workshop as they labeled it was to be held at the Athens City Hall at 11:30 a.m. on 501 North Pinkerton Street (Annex Building). The Reverend Charles Stovall, Pastor of the Camp Wisdom United Methodist Church of Dallas, 12 Black Residents of Athens and myself were in attendance. The workshop never took place and was a mere future agenda item in their regular Athens City Hall Meeting Session. Only 3 people were allowed to speak. So, as you can see it lasted for only 9 minutes. One additional black resident attempted to speak and was abruptly cut off by Athens Mayor Jerry King who asked all of the black residents to leave the building because they had other city business to discuss. Mayor King also vented extreme hatred by telling the entire group of black Athens citizens that he did not appreciate them inviting, "OUTSIDERS" like Reverend Stovall and myself. He told us, the black group to speak with new Police Chief Jim Vance individually and not as a group. Here are some observations that need attention and immediate action by Congress and the Justice Department.

1. The memorandum of Agreement and Understanding between The Athens Police Department and the Black Citizens of Athens is null and void. It was

signed by the former Police Chief of Athens Dave Harris who retired and still runs the Athens Police Department in an ex-officio capacity as a paid consultant. All memorandums of agreement and understanding are not recognized by law because they are not a law, rule or regulation.

2. The new police chief of Athens came from Garland, Texas Police Department which has a long standing legacy of hatred and abuse of black citizens. Athens Police Chief Jim Vance was at the helm of the Garland Police Department when a black pharmacist from the Eckerd's Drug Store in Garland was beaten beyond recognition by a Garland Police Officer in 1999. Athens in effect recruited a police chief with racist credentials to continue the legacy of unchecked murder of black citizens in Athens.

3. No one from Congressman Pete Sessions Athens office or East Dallas Office showed up at the so-called workshop. The citizens called Congressman Pete Sessions toll free number in Dallas and never received a call back. There is a perception on the part of these citizens that the staff of Congressman Sessions Athens office has ties to the local Ku Klux Klan chapter in Athens and are large wealthy contributors to Congressman Pete Sessions election campaigns.

4. The only black female Athens City Council member is Gladys Elaine Blanton Jenkins. She is a convicted felon having served prison time in Texas and California for Prostitution and Drugs. She is controlled by Athens Mayor Jerry King. No one in the State of Texas can hold elective office who has felony convictions. She must be removed from office immediately.

5. A black man was killed by the Athens Police some three weeks ago. Nothing was investigated.

6. Shaneque Tilley, a black female from Athens (DOB 7-22-1982) was arrested by the Athens Police as the (sic) crawled into the window of Tilley's North Athens home. The Athens Police beat her as she was 9 months pregnant and killed her unborn child who was aborted. Tilley is now chained naked to a prison bed in the Athens City Jail (Henderson County Seat), bleeding, has no access to medical care or sanitary napkins. We asked Mayor Jerry King to give us access to Tilley-he denied it. Tilley is also not allowed any bond from a black bail bondsman named Barbara and Clyde Bowman Sr. who can be reached at (903) 675-5474. No hospital or doctor for a woman that had a miscarriage of a child at the brutal hands of the Athens City Police.

7. The Athens Police intimidate, harass and murder black residents on a daily basis. They come out of their police cars and approach black teens with their weapons drawn. They follow black residents around the city, pulled over Ms. Barbara Bowman who had prom dresses. dumped the prom dresses into the grass and then stomped over them to make them unusable. They ticket black citizens even if they don't turn on a car turn indicator 100 feet from the stop sign to increase revenue and land all black into the jail system. They intimidate black older citizens of Athens calling them nigger girl and nigger boy. Ms. Bowman has a list of all the black citizens in Athens that have been murdered by the Athens police and the Klan who are one in the same.

8. Peaceful picketing is not allowed in Athens and it is a law. If blacks picket, they will be met head on by Athens Police. The Police have taunted Ms.

Bowman in Court during Trial in Judge Elaine Coffman's Court.

9. Lee Alcorn, of the Coalition of Civil Rights took $6,700 from the black citizens of North Athens to represent them. He turned around and sold their confidential information to Mayor Jerry King and the outgoing Athens Police Chief. Now these citizens are targeted by the Police.

10. Councilwoman Elaine Jenkins threatened Mrs. Barbara Bowman because Mrs. Bowman called radio station KNON in Dallas and spoke about how the Athens Police were killing blacks and torturing them on a routine basis.

11. The Athens police does racial profiling. The only people punished in Athens Teen Court are blacks. The other white kids that get in trouble just merely pay a fine and never appear in court.

12. Mayor Jerry King refused to give the black citizens of Athens the minutes to the meeting. We demanded and he stated that 10 copies was basically too much. We would have to come back because the feeder on the Xerox machine was not working properly and would have to be manually fed. A woman whose son was murdered by the Athens Police is not allowed to visit her birthplace which is Athens, Texas. She can not visit her elderly mother. The last time she visited Athens, she was at the Dollar General Store, confronted by the Police and told to leave. Her elderly mother was visited by the Athens Police and threatened.

In closing, it was best summed up by Reverend Charles Stovall. The Athens Police Force is responsible for the suffering and intimidation of Black citizens. The memorandum and it's (sic) revisions mean nothing to the City of Athens and the Police Force.

Mrs. Bowman was not even listed on the Bonding List and the Police Chief issued her a letter of Apology. We do not know if Ms. Tilley is alive or dead.

Signed,

/s/

Paul Martin Clark

President

BCJLO Inc. (214) 328-3722

APPENDIX B

DISTRICT COURT OF TEXAS,
3rd Judicial District.
Henderson County

No. 03-066

GLADYS ELAINE BLANTON JENKINS,
Plaintiff,

v.

PAUL MARTIN CLARK and BLACK CITIZENS FOR JUSTICE, LAW and ORDER, INC.,
Defendants.

August 21, 2006

FINAL JUDGMENT

Hon. Jim Parsons.

On June 12, 2006, this cause came on to be heard and Plaintiff Gladys Elaine Blanton Jenkins, appeared in person and by attorney of record and announced ready for trial and Defendant Paul Martin Clark, although duly notified of the trial date, failed to appear in person, but instead appeared through his attorney of record, Kent Starr, and announced ready for trial, and Defendant Black Citizens for Justice Law and Order, Inc. appeared through its executive director Daisy Joe and by its attorney of record, Eliot Shavin and announced ready for trial; and a jury having been demanded, all questions of fact regarding liability and damages were submitted to the jury and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. The Charge of the Court and the verdict of the jury are incorporated herein for all purposes by reference as Exhibit "A." Because it appears to the Court that the verdict of the jury was for the Plaintiff and against Defendants Paul Martin Clark and Black Citizens for Justice Law and Order, Inc., judgment should be rendered on the verdict in favor of the Plaintiff and against the Defendants.

IT IS THEREFORE, ORDERED by the Court that a Final Judgment establishing liability and awarding damages in favor of Plaintiff Gladys Elaine Blanton Jenkins against Defendants is proper; and

IT IS THEREFORE ORDERED by the Court that Plaintiff Gladys Elaine Blanton Jenkins have and recover from Defendants, Paul Martin Clark and Black Citizens for Justice Law and Order, Inc., jointly and severally, the sum of $300,000.00 as actual damages, including prejudgment interest at the highest amount permitted by law with post judgment interest from the date of this Judgment at the rate of six percent (6%) until paid.

IT IS FURTHER ORDERED, by the Court that Plaintiff Gladys Elaine Blanton Jenkins is awarded a judgment against each Defendant, in the amount of $100,000.00 which was awarded by the jury as exemplary damages against each Defendant.

All costs of court expended or incurred in this cause are adjudged against Defendants, Paul Martin Clark and Black Citizens for Justice Law and Order, Inc.

All writs and processes for the enforcement and collection of this judgment and/or the costs of court may issue as necessary.

This is a final appealable judgment.

SIGNED this 21 day of August, 2006.

<<signature>>

JUDGE PRESIDING

APPENDIX C

SUPREME COURT OF TEXAS,
Austin, Texas

Case No. 08-0361
COA # 07-06-00385-CV

GLADYS ELAINE BLANTON JENKINS,
Plaintiff,

v.

PAUL MARTIN CLARK and BLACK CITIZENS FOR JUSTICE, LAW and ORDER, INC.,
Defendants.

September 26, 2008

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX D

SUPREME COURT OF TEXAS,
Austin, Texas

Case No. 08-0361
COA # 07-06-00385-CV

GLADYS ELAINE BLANTON JENKINS,
Plaintiff,

v.

PAUL MARTIN CLARK and BLACK CITIZENS FOR JUSTICE, LAW and ORDER, INC.,
Defendants.

December 5, 2008

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

APPENDIX E

REPORTER'S RECORD
IN THE DISTRICT COURT
HENDERSON COUNTY, TEXAS
3RD JUDICIAL DISTRICT

Cause No. 03-0666

GLADYS ELAINE BLANTON JENKINS

vs.

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.

JURY TRIAL

On Monday, the 12th day of June, 2006, the above-referenced proceedings were commenced in open court before Jim Parsons, judge presiding, and the following proceedings were had:

THE COURT: I hope you tell everybody.

MR. CARTER: I am.

(The following proceedings had before the jury:)

MR. CARTER: Ladies and gentlemen of the jury, at this time for Elaine Jenkins we rest our case chief.

MR. SHAVIN: We have a motion.

THE COURT: Ladies and gentlemen of the jury: I have a legal issue to take up. Take about ten minutes, then I'll bring you back in. All rise.

(The following proceedings had with the jury absent from the courtroom:)

THE COURT: You may proceed, Counsel.

MR. SHAVIN: Thank you, Your Honor. At this time the Defendants, Black Citizens for Justice, Law and Order, Paul Martin Clark moves for a directed verdict on the grounds that there's no evidence to support a claim for libel in this case since there has been no evidence of a publication by the Defendants of A defamatory statement to a third party other than Congressman Pete Sessions. There's no evidence of any damages flowing from that publication or that there was any forseeability that there would be a republication by Mr. Sessions to the witnesses that have testified in this case. There's further no evidence that there is any authorization flowing from my clients, BCJLO and Mr. Clark to Mr. Sessions authorizing him to disclose the memorandum to the witnesses who have testified in this case.

Defendants further move for a directed verdict on the ground that there is no clear and convincing evidence that Paul Martin Clark acted with actual malice in publishing the memorandum at issue in this case because there is no evidence of any actual knowledge that the statements in the memorandum were false pertaining to Ms. Jenkins. There is further no evidence that he, Paul Martin Clark, actually entertained serious doubts as to the fruit of the statements contained in the memorandum that pertained to Ms. Jenkins.

Defendants further move for a directed verdict on the issue of ratification by the BCJLO, there is no evidence that BCJLO, the Black Citizens for Justice Law and Order ratifieed the libel or that BCJLO authorized Paul Martin Clark to commit any libel.

Your Honor, further there is evidence that has been produced that establishes as a matter of law that the statements made in this case the subject of this litigation, false statements that were made were made in good faith to, and only to a government official about a government official with a view of obtaining action on a valid grievance. There is no evidence to support a finding that the statements were not made to a government official with a view to obtaining action on a valid grievance.

Your Honor, Defendants further move for a directed verdict on the issue of damages. There is no evidence from which a jury, a reasonable juror can conclude that any of the damages that were testified to by Ms. Jenkins flowed from an action of my client, the defendants in this case. The only damages that flowed in this case, if there is evidence, flowed from a publication by the mayor to the Plaintiff. There is no evidence that my clients authorized the mayor to make that publication to Ms. Jenkins or that my clients could foresee that the mayor did so.

Further, Your Honor, there is no evidence to support a finding that there has been any injury to the Plaintiff's character or reputation in the community. There's been simply no evidence from any witness that her reputation suffered as a result of the publication of the statements made in this case or that her standing in the community has been harmed.

Your Honor, on the grounds that the Plaintiff is a public official and that the communications in this case are fully protected by the the First Amendment, both the Petition Clause of the First Amendment as well as the Speech Clause of the First Amendment.

That there's been no evidence of actual malice and for other reasons stated, the Defendants move for a directed verdict.

THE COURT: Overruled. Bring the jury in.

All rise.

APPENDIX F

No. 07-06-00385-CV

IN THE SEVENTH COURT OF APPEALS
AMARILLO, TEXAS

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,
Defendants/Appellants,

v.

GLADYS ELAINE BLANTON JENKINS
Plaintiff/Appellee.

BRIEF OF APPELLANTS

CHAD BARUCH
Texas Bar Number
01864300
THE LAW OFFICE OF
CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028
Lead Appellate Counsel for Appellants

ELIOT D. SHAVIN
Texas Bar Number 18138200
LAW OFFICE OF ELIOT SHAVIN
4514 Cole Avenue, Suite 1015
Dallas, Texas 75205-5412
Telephone: (214) 522-2010
Facsimile: (214) 522-7944
Co-Counsel for Appellant Black Citizens for Justice, Law and Order, Inc.

KENT W. STARR
Texas Bar Number 00798527
STARR & ASSOCIATES, P.C.
4245 N. Central Ewy, Suite 350
Dallas, Texas 75205
Telephone: (214) 219-8440
Facsimile: (214) 219-8441
Co-Counsel for Appellant Paul Martin Clark

Statement of the Case

Athens City Council member Gladys Jenkins sued Paul Martin Clark and Black Citizens for Justice Law and Order, Inc. in the 3rd Judicial District Court of Henderson County, Texas. Ms. Jenkins alleged that BCJLO and Mr. Clark defamed her in a memorandum sent to Congressman Pete Sessions seeking federal investigation of alleged civil rights violations.[1] The jury returned a verdict against both defendants, awarding Ms. Jenkins actual damages of $300,000 and exemplary damages of $100,000.[2] Defendants unsuccessfully sought a directed verdict[3] and judgment notwithstanding the verdict,[4] and the district court entered judgment in accordance with the jury's verdict.[5] Both defendants then filed notice of appeal[6]

Statement of Issues

The primary issue is whether the district court erred in denying the motions by BCJLO and Mr. Clark for directed verdict and judgment notwithstanding the verdict. The district court's rulings on these motions raise the following questions:

1. BCJLO and Mr. Clark made the defamatory statements about Ms. Jenkins in a written request for government action. The district court, in accor-

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[1] CR-I at 0001-0006. References to the Clerk's Record are indicated by CR, followed by the volume and page numbers. References to the Reporter's Record are indicated by RR, followed by the volume and page numbers.

[2] CR-III at 028B-0300; Appendix 2.

[3] RR-2 at 284.

[4] CR-III at 0306-0311, 0324.

[5] CR-III at 0312-0313; Appendix 1.

[6] CR-III at 0314-0315.

dance with the U.S. Supreme Court's decision in *McDonald v. Smith*, held that defamatory statements made in a petition to the government are not privileged under either the Texas or United States Constitutions if made with actual malice. The jury found that BCJLO and Mr. Clark made the statements with actual malice. The only evidence of actual malice introduced at trial was that neither BCJLO nor Mr. Clark knew anything about Ms. Jenkins, and that they conveyed the defamatory statements without any knowledge—or even any consideration—of their 'truth. Was this sufficient evidence of actual malice?

2. The evidence established that BCJLO and Mr. Clark were seeking government action by their petition. There was no finding and no evidence to support any presumed finding that the petition was a sham or was made in bad faith. Are defamatory statements made in a petition to the government—even when made with actual malice—absolutely privileged under the Petition Clauses of the Texas or United States[7] Constitutions?

---

[7] BCJLO and Mr. Clark recognize that this court's decision with respect to the First Amendment to the U.S. Constitution is controlled by *McDonald*, but preserve their claim for reversal of it in the event of appeal to the U.S Supreme Court.

Prayer for Relief

Statements made in a petition to the government are absolutely privileged under Texas law. This court should decline to apply the reasoning in *McDonald* to eviscerate the freedoms afforded to Texans since the declaration of their independence from Mexico. For this reason—and because Ms. Jenkins failed to introduce evidence of actual malice—this court should reverse the judgment and render judgment in favor of BCJLO and Mr. Clark.

Respectfully submitted,

CHAD BARUCH
Texas Bar Number
01864300
THE LAW OFFICE OF
CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028
Lead Appellate Counsel for Appellants

ELIOT D. SHAVIN
Texas Bar Number 18138200
LAW OFFICE OF ELIOT SHAVIN
4514 Cole Avenue, Suite 1015
Dallas, Texas 75205-5412
Telephone: (214) 522-2010
Facsimile: (214) 522-7944
Trial Counsel and Appellate Co-Counsel for Appellant Black Citizens for Justice, Law and Order, Inc.

KENT W. STARR
Texas Bar Number 00798527
STARR & ASSOCIATES, P.C.
4245 N. Central Ewy, Suite 350
Dallas, Texas 75205
Telephone: (214) 219-8440
Facsimile: (214) 219-8441
Trial Counsel and Appellate Co-Counsel for Appellant Paul Martin Clark

Certificate of Service

The undersigned certifies that true and correct copies of this brief were served by United States Certified Mail on February 20, 2007, upon the following counsel of record:

E. Leon Carter
13155 Noel Road
900 Galleria Tower
Dallas, Texas 75240

Shelli Morrison
518 East Tyler Street
Athens, Texas 75751

/s/ Charles "Chad" Baruch
Charles "Chad" Baruch

APPENDIX G

No. 08-0361

IN THE SUPREME COURT OF TEXAS

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,
Petitioners

v.

GLADYS ELAINE BLANTON JENKINS,
Respondent

On Petition for Review from the
Seventh Court of Appeals at Amarillo, Texas

PETITION FOR REVIEW

THE LAW OFFICE OF
CHAD BARUCH
Charles "Chad" Baruch
Texas Bar Number
01864300
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

BAKER BOTTS L.L.P.
Thomas R. Phillips
Texas Bar Number
00000102
Allyson N. Ho
Texas Bar Number
24033667
98 San Jacinto, Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2500
Facsimile: (512) 322-2501

LAW OFFICE OF
ELIOT SHAVIN
Eliot D. Shavin
Texas Bar Number
18138200
4514 Cole Avenue,
Suite 1450
Dallas, Texas 75205
Telephone: (214) 522-2010
Facsimile: (214) 528-1411

STARR & ASSOCIATES
Kent W. Starr
Texas Bar Number
00798527
4245 N. Central Ewy.,
Suite 350
Dallas, Texas 75205
Telephone: (214) 219-8440
Facsimile: (214) 219-8441

ISSUES PRESENTED

1. Can statements concerning possible corruption by a public official made solely in a petition for redress of grievances addressed to government authorities charged with investigating those claims support an action for libel, or are those statements absolutely privileged under Article I, section 27 of the Texas Constitution or the First Amendment to the U.S. Constitution?[1]

2. If a public figure may bring an action for libel based on statements made solely in a petition for redress of grievances, is there clear and convincing evidence of actual malice on this record, where the defendants merely recounted to government authorities citizen accusations against public officials?

* * * *

[1] Petitioners acknowledge that their First Amendment argument is foreclosed by the U.S. Supreme Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1987), but raise the issue to preserve their right to seek review and redetermination of that decision in that court.

Respectfully submitted,

THE LAW OFFICE OF CHAD BARUCH

/s/ Charles "Chad" Baruch
by permission TRP

Charles "Chad" Baruch
Texas Bar Number 01864300
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

BAKER BOTTS L.L.P.
Thomas R. Phillips
Texas Bar Number 00000102
Allyson N. Ho
Texas Bar Number 24033667
98 San Jacinto, Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2500
Facsimile: (512) 322-2501

LAW OFFICE OF ELIOT SHAVIN
Eliot D. Shavin
Texas Bar Number 18138200
4514 Cole Avenue, Suite 1450
Dallas, Texas 75205
Telephone: (214) 522-2010
Facsimile: (214) 528-1411

STARR & ASSOCIATES
Kent W. Starr
Texas Bar Number 00798527
4245 North Central Expressway,
Suite 350
Dallas, Texas 75205
Telephone: (214) 219-8440
Facsimile: (214) 219-8441

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this instrument was served this 17th day of June, 2008, by United States Certified Mail, upon the following counsel of record:

Susan Hays
5424 Milton Street, Suite 218
Dallas, Texas 75206

/s/ Thomas R. Phillips
Thomas R. Phillips

(3)

Supreme Court, U.S.
FILED
JUN 1 - 2009
OFFICE OF THE CLERK

No. 08-1122

IN THE
Supreme Court of the United States

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,

PETITIONERS,

V.

GLADYS ELAINE BLANTON JENKINS,

RESPONDENT.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Seventh District

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN HAYS
GEISLER HAYS, LLP
2911 Turtle Creek Blvd.,
Ste. 940
Dallas, TX 75219
Tel.: (214) 367-6020

DAVID J. SCHENCK
Counsel of Record
RICHARD D. SALGADO
JONES DAY
2727 North Harwood St.
Dallas, TX 75201-1515
Tel.: (214) 220-3939

Counsel for Respondent

QUESTION PRESENTED

Whether this Court should overrule its own precedent in *McDonald v. Smith*, 472 U.S. 479 (1985), and find that the Petition Clause of the First Amendment provides an absolute privilege to libel where a defamatory statement about another person is communicated, with actual malice, via a "memo" sent outside any formal process, to a government official.

PARTIES TO THE PROCEEDING

Petitioners are Paul Martin Clark and Black Citizens for Justice, Law and Order, Inc. Respondent is Gladys Elaine Blanton Jenkins, a Texas resident.

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No. 08-1122

IN THE

Supreme Court of the United States

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,

PETITIONERS,

v.

GLADYS ELAINE BLANTON JENKINS,

RESPONDENT.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Seventh District

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Deliberate falsity and wanton, reckless disregard for the truth has never enjoyed an elevated constitutional value and merits no special constitutional protection here. Indeed, 24 years ago, this Court confirmed that this fundamental principle

applies to the Petition Clause as well when it held that although "[t]he right to petition is guaranteed, the right to commit libel with impunity is not." *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

Petitioners now ask this Court to throw out that precedent and rule instead that the First Amendment's Petition Clause guarantees an absolute privilege to deliberately say *anything* about *anyone* — regardless of falsity — to *any* public official, without fear of consequence. This interpretation would render public officials defenseless against even the most baseless and outrageous accusations, and open the floodgates to an onslaught of reckless, unsubstantiated rumors and outright lies presented as factual statements from behind an iron curtain of constitutional immunity. That outcome would unnecessarily turn nearly a quarter century of precedent both here and in the lower courts on its head and create unwarranted inconsistency in First Amendment jurisprudence that has been well-established for decades.

The race-relations progress made in rural Texas — where an African-American female can be and is routinely elected to an at-large city council seat — is real. While Petitioners have a right to hold extreme views of race relations, their assertions of their motives and the acts of Ms. Jenkins and her colleagues are still subject to a credibility review by a jury. Given the jury's findings here, this case is in fact quite the opposite of the "ideal vehicle" to revisit the Petition Clause Petitioners claim it to be. The evidence presented to the jury successfully demonstrated that the Petitioners did more than merely report, but very colorfully embellished, then

repeated, the allegations to more than a governmental official.

STATEMENT

On November 20, 2002, Paul Martin Clark attended a City Council meeting in Athens, Texas on behalf of Black Citizens for Justice, Law, and Order, Inc. ("BCJLO"). *See* Pet. Appx. at 4a. There is a history of racial tension between some black citizens of Athens and the city's police department. The ostensible purpose for Mr. Clark's visit was to take notes on citizens' concerns and communicate those concerns to United States Congressman Pete Sessions and the Department of Justice ("DOJ"). *Id.* at 5a. According to Mr. Clark, the City Council meeting lasted less than ten minutes. *Id.* at 41a. Afterward, Mr. Clark convened with a handful of citizens at a private residence to further discuss racial concerns in Athens. *Id.* at 5a.

I. THE DEFENDANTS SUBMIT A MEMORANDUM FILLED WITH OUTRAGEOUS ALLEGATIONS OF MURDER, PROSTITUTION, AND KLAN ACTIVITY.

The day after attending the City Council meeting and the subsequent private meeting, Mr. Clark delivered a Memorandum (the "Clark Memorandum") to Daisy Evella Joe, BCJLO's Chief Executive Officer. *Id.* at 6a. The Memorandum advanced an assortment of shocking, wholly uncorroborated and ultimately untrue accusations against Athens' mayor, city council members, police force, newly hired police chief, and even Congressman Sessions' own office. *Id.* at 42a. The Clark Memorandum brazenly stated as fact that Athens had "recruited a police chief with racist credentials to continue the legacy of unchecked

murder of black citizens in Athens," that "a black man was killed by the Athens police some three weeks ago" without any subsequent investigation, that the Athens police beat a woman who was nine months pregnant, killing her unborn child, and chained her naked to a bed in the county jail, that the Athens police and "the Klan" are "one in the same," and that "[t]he Athens police intimidate, harass and murder black residents on a daily basis." *Id.* at 41a-45. Additionally, the Memorandum suggested that members of Congressman Sessions' staff have ties to the Ku Klux Klan. *Id.*

To be sure, many of the statements contained in the Memorandum could be grounds for libel against many, but this case arises solely out of the allegations in the Memorandum against Athens City Council member Gladys Elaine Blanton Jenkins. Specifically, the Clark Memorandum baldly charged that Ms. Jenkins — the only African-American City Council member, a mother of three, and an ordained minister — "is a convicted felon having served prison time in Texas and California for prostitution and drugs." *Id.* at 42a. Although the Memorandum cited no source for the accusation, it issued a call to action: "No one in the State of Texas can hold elective office who has felony convictions. She must be removed from office immediately." *Id.*[1]

Ms. Joe briefly glanced at the Clark Memorandum before sending it to Congressman Sessions and the DOJ. *Id.* at 6a. At no time while preparing, reviewing, or forwarding the

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[1] Under Texas law, convicted felons may not hold public office. TEX. ELEC. CODE § 141.001(a)(4).

Memorandum did Mr. Clark, Ms. Joe, or anyone else at BCJLO investigate or otherwise attempt to verify the serious allegations that it contained. *Id.* Congressman Sessions forwarded the Memorandum to Athens' mayor, who in turn shared it with the city administrator and police chief. *Id.* at 7a-8a. They subsequently met with Ms. Jenkins, who volunteered, albeit with great humiliation, to submit to fingerprinting and investigation by the Athens police and the Texas Rangers to determine whether she had a criminal history. *Id.* at 8a She did not. *Id.* BCJLO later picketed Congressman Sessions' Dallas office for some months, repeating the demand that Jenkins be removed from office based on her nonexistent criminal history. 3 RR 58, 62.

II. On Evidence Challenging the Petitioners' Acts and Motives, Ms. Jenkins Obtains a Favorable Jury Verdict of Malice.

On February 23, 2003, Ms. Jenkins filed suit against Mr. Clark and BCJLO for defamation and libel. Ms. Jenkins' claims were tried to a jury over two days. Multiple witnesses disputed Clark's characterization of events at the city council meeting and at the private meeting. *See* Pet. Appx. 30a, 34-35a. The jury returned a verdict against Mr. Clark and BCJLO, awarding Ms. Jenkins $300,000 for past and future damages due to mental anguish, injury to character and/or reputation and injury to her standing in the community. *Id.* at 47a. She was also awarded exemplary damages of $100,000 each against BCJLO and Clark, for a total of $500,000. *Id.*

The Texas Court of Appeals for the Seventh District of Texas affirmed in an opinion that turned almost exclusively on state law. The court rejected

Petitioners' argument that the right to petition is somehow distinct — insofar as immunity from libel is concerned — from the rest of the First Amendment, including the freedom of speech. Applying Texas law, the court found "persons who exercise their right to petition do so in the absence of absolute immunity and may be held liable for their communications if the plaintiff is able to make a showing sufficient to satisfy the *New York Times* standard for 'actual malice.'" *Id.* at 14a. In other words, Petitioners were entitled only to qualified immunity. *Id.* The Court of Appeals found that the *Noerr-Pennington* doctrine, which holds that petitioning the government to take anticompetitive action does not violate antitrust laws, has no application in this case. *Id.* at 23a. The Court of Appeals further noted that the Memorandum was not sent to Congressman Sessions or the DOJ as part of a legislative proceeding, but rather in an effort to instigate an investigation. *Id.* at 21a. Thus, even to the extent that petitioning activity is entitled to some privilege, the activity in this case would not be entitled the furthest reaches of that protection.

Additionally, the Court of Appeals recognized that the jury disbelieved Mr. Clark's testimony that he was a mere scrivener who recorded what was said at the meetings, and found that the jury could have inferred that Mr. Clark "made up" or "imagined" the facts underlying his statement related to Ms. Jenkins, or falsely and recklessly reported what he actual heard. *Id.* at 40a. As the Court of Appeals concluded, "At best, Clark repeated in writing a false, scandalous rumor consisting of trumped up felony charges, convictions, and imprisonment in

furtherance of removing Jenkins from office. At worst, Clark made up or imagined the [allegations]. In either instance, . . . Clark acted with 'actual malice' by clear and convincing evidence." *Id.* Petitioners do not and, at this stage, cannot dispute the jury's factual determination.

On June 17, 2008, BCJLO filed a petition for discretionary review in the Texas Supreme Court. On September 26, 2008, that court refused review. BCJLO filed a motion for rehearing, which the Texas Supreme Court denied on December 5, 2008.

REASONS FOR DENYING THE PETITION

This Court's controlling precedent in *McDonald* makes abundantly clear that the Petition Clause of the First Amendment does not provide an absolute privilege to engage in libel. But in an effort to convince the Court to now abandon its earlier ruling and unravel the past quarter century of precedent, Petitioners mischaracterize *McDonald* as a wrongly decided aberration that has been the subject of substantial judicial and scholarly criticism. To the contrary, the criticism of the decision is relatively limited and, indeed, no more pronounced than the ordinary and typical criticism incurred by virtually any substantive precedent established by this Court.

More importantly, the *McDonald* decision is consistent with the Court's treatment of the Petition Clause, the Freedom of Speech, and libel law in other contexts, and is the only viable outcome that protects the various competing interests at play in this corner of First Amendment jurisprudence. In all events, this case is hardly the "ideal vehicle" that Petitioners claim it to be for revisiting *McDonald* insofar as the

communication by Mr. Clark and BCJLO was not made in the course of legislative or judicial proceedings and thus occupies only the outer edge of the Petition Clause's protective scope. Likewise, contrary to Petitioners' assertions, this case would not provide a proper opportunity to resolve conflicts regarding the punishment of republication insofar as the jury's findings render that question largely moot.

I. *McDonald v. Smith* Has Gone Largely Unchallenged For Nearly A Quarter Century

In the decades since the Court issued the *McDonald* decision, lower courts have relied upon it more than 250 times. Indeed, the Federal Courts of Appeal have been unwavering in their adherence to the decision, applying it not just for its direct holding that the Petition Clause does not provide absolute privilege against libel, but also for the overarching principle that there is no hierarchy of rights in the First Amendment. In short, *McDonald* has become an interwoven part of the First Amendment jurisprudence of virtually every federal appellate court.[2]

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[2] *See, e.g., Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008) (holding that the rights of speech in the constitution are inseparable); *Cobb v. Pozzi*, 363 F.3d 89, 105 (2d Cir. 2004) (citing *McDonald* for the principle that there is no hierarchy of rights in the First Amendment); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 891 (10th Cir. 2000) (agreeing that the right to petition is not an absolute protection from liability); *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999) (confirming that intentional or reckless falsehood "enjoys no First Amendment protection"); *Grigley v. City of Atlanta*, 136 F.3d 752, 755-56 (11th Cir. 1998) (citing *McDonald* to hold that the Petition Clause is not entitled to any greater

While Petitioners suggest that the decision has been roundly criticized in ensuing years, they in fact point to only a small handful of selectively culled law review articles — from which they claim a "scholarly consensus" — and a single concurring opinion by a state court judge. *See* Pet. Br. at 21-23. If the mere existence of scholarly criticism were grounds to revisit and reverse earlier precedents, however, this Court would be busying itself reconsidering hundreds of otherwise settled precedents ranging from *Marbury v. Madison*[3] to *Brown v. Board of*

(continued...)

protection than the Free Speech Clause); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220-21 (9th Cir. 1997) (citing *McDonald* to state that the right to petition is "cut from the same cloth as the other guarantees of [the First] Amendment"); *San Filippo v. Bongiovanni*, 30 F.3d 424, 437-38 (3d Cir. 1994) (noting *McDonald* to hold that the scope of the right to petition depends on the context in which that right is exercised); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (holding that right-to-petition claims are also governed by interest-balancing principles and subject to the same constitutional analysis as the right to free speech); *Wright v. DeArmond*, 977 F.2d 339, 346 (7th Cir. 1992) (holding that the right to petition has never been considered an absolute right); *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988) (confirming the Petition Clause does not enjoy a preferred place among First Amendment freedoms); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 640 (8th Cir. 1986) (stating that *McDonald* "clearly underscores the coequal status of the right to petition with other first amendment rights"); *Webster v. Sun Co., Inc.*, 790 F.2d 157, 161-62 (D.C. Cir. 1986) (stating that the constitutional protection of the right to petition does not require states to provide an absolute privilege for all communications with government).

[3] *See, e.g.*, Michael Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1117 (2001)

Education.[4] Similarly, a single criticism of the decision by a concurring judge on a state court is not suitable grounds to revisit this well-established precedent, particularly where as in this case, none of that judge's colleagues joined his criticism. *See J&J Constr. Co. v. Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 735 (Mich. 2003) (Young, J., concurring). Simply put, none of the "criticism" cited by Petitioners amounts to cause for reconsideration of *McDonald*.

II. *McDONALD* WAS CORRECTLY DECIDED

While Petitioners decry *McDonald* as "inconsistent" with other precedents and attempt to position the right to petition on a pedestal high above

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(describing *Marbury's* arguments in defense of judicial review as "thoroughly unpersuasive"); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 651-66 (1982) (concluding that "we are left with no obvious peg on which to hang Marshall's conclusion").

[4] *See, e.g.*, Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L. J. 179, 246 (1967) ("[T]he rule of *Brown v. Board of Education* is not now, nor has it ever been, the supreme law of the land. Rather, it is an unwarranted exercise of non-existent authority which, being illegitimate in its origin, cannot be made legitimate by the lapse of time, nor by compliance, voluntary, purchased, or coerced."); Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly.").

other core First Amendment rights, the outcome they advocate would in fact run contrary to the most fundamental principles of First Amendment law—namely that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) — and would be a detriment to the very speech and petition rights that they purport to embrace and protect.

A. The First Amendment Does Not Protect A Deliberate or Reckless Falsehood, Regardless Of Whether It Constitutes Political Speech Or A Petition To The Government

Petitioners' entire argument is premised on their objection to the Court's conclusion in *McDonald* that "[t]he right to petition is cut from the same cloth as the guarantees of [the First] Amendment." 472 U.S. at 482. According to Petitioners, the right to petition is different: it "was the preeminent right" and is "preferred" and "superior" to the other rights secured in the First Amendment. *See* Pet. Br. at 20, 23. That understanding, however, is directly at odds not only with *McDonald* but with myriad other decisions of this Court, dating back several decades, which identify *political speech* as the preeminent right secured in the First Amendment.

Indeed, this Court has repeatedly held that "[p]olitical speech . . . is at the core of the First Amendment." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988); *see also Morse v. Frederick*, 551 U.S. 393 (2007)("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'"); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (same); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S.

377, 422 (1992) ("Core political speech occupies the highest, most protected position"). And, yet, even this right is not absolute. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding ban on campaigning with 100 feet of polling stations on election day); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (upholding criminal conviction for circulating pamphlets opposing the draft in World War I).

To be clear, the Court has resisted elevating any one First Amendment right above the others in the manner that Petitioners urge. Nonetheless, to the extent that varying levels of protection exist, it would be absurd to suggest that the right to petition enjoys greater protection than the right to engage in core political speech. *See Fed. Elec. Comm'n v. Wisc. Right to Life*, 551 U.S. 449, __, 127 S.Ct. 2652, 2686 (2007) ("It is perhaps our most important constitutional task to assure freedom of political speech."). Even this most exalted form of speech yields to defamation law. *Chaplinksy v. New Hampshire,* 315 U.S. 568, 572 (1942).

In *Chaplinksy*, the Court held that "[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity." *Id.* Like Petitioners here, the *Chaplinksy* Court looked to history to determine the proper balance between protecting the freedoms found in the First Amendment and guarding against the dissemination of falsehood, but reached a very different conclusion:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant . . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.

Id. In other words, this Court has long recognized that the harm caused by the communication of knowingly false and defamatory statements—even when done under the auspice of core political speech—is a serious threat to democratic government. Indeed, the facts in this case—in which Mr. Clark and BCJLO knowingly communicated falsehoods as a tool to unseat Ms. Jenkins—are identical to risks contemplated (and carefully avoided) by the Court.

Indeed, none of this should come as a surprise. As Justice Holmes famously observed in *Schenck*, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. at 52. In this case, creating a new and distinct zone of absolute immunity would do little more than invite mayhem in connection with, among other things, confirmation hearings and other essential governmental proceedings.

B. *McDonald* Can Readily Be Reconciled With The *Noerr-Pennington* Doctrine

Petitioners claim that *McDonald* is in "irreconcilable conflict" with the so-called *Noerr-*

Pennington doctrine. *See* Pet. Br. at 23 (citing *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). That doctrine holds, in effect, that petitioning the government to take anticompetitive action does not violate antitrust laws. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991). In attempting to characterize the doctrine as indicating that the Petition Clause is so robust that it must afford absolute immunity against liability in all contexts, however, Petitioners fail to appreciate that the truthfulness of a statement or petition is an essential prerequisite to acquiring constitutional protection in the first instance. If the statement itself is known to be a lie, there is no constitutional protection to invoke and doctrines Petitioners invoke, such as *Noerr-Pennington,* never come into play.

It is well established in this Court that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *see also Gertz*, 418 U.S. at 339 ("no constitutional value in false statements"). Indeed, "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected." *Chaplinksy,* 315 U.S. at 572.

The calculated falsehood falls into that class of utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

derived from them is clearly outweighed by the social interest in order and morality." *Id.* Thus, before the First Amendment guarantees even apply in the first instance to provide a privilege of any sort, the underlying statement/petition must be — as an essential prerequisite — at least subjectively believed to be truthful. Only then, if a communication is not a deliberate or reckless falsehood, does the Petition Clause apply to provide immunity against antitrust laws. Consequently, the "irreconcilable conflict" between *McDonald* and *Noerr-Pennington* that Petitioners assert simply is not a conflict at all.

C. Petitioners' Preferred Interpretation Would Be Detrimental To Democratic Government

Petitioners characterize their argument as protecting the right of ordinary citizens to petition their congressman and other government officials. *See* Pet. Br. at 28. The right to petition one's congressman or other government official is not at issue, however. Rather, this case concerns whether citizens have the constitutional right to lie to their congressman.

If, as Petitioners urge, the Petition Clause affords absolute privilege to every communication made by a citizen to the government, it would eliminate an essential safeguard of public discourse and encourage the use of deliberate and reckless falsehood as a tool to effectuate political change — directly contrary to this Court's earlier admonitions. *See Chaplinksy*, 315 U.S. at 572. Genuine, honest efforts to petition the government for redress would risk being drowned out in the rushing tide of reckless and false communications. Legislators and other officials

would have absolutely no implied filter of subjective *bona fides* in the myriad public communications they receive. Instead, they would be faced with the difficult choice between expending valuable resources to sift through and investigate the increased number of fanciful or knowingly false allegations or simply ignoring constituents' complaints altogether. To be sure, the right to petition does not require the government to review or respond to the petitions it receives. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."). Thus, by eliminating the only deterrent and thereby increasing the volume of unreliable and defamatory petitions, Petitioners' preferred outcome would actually diminish the value of those petitions altogether.

Additionally, the outcome urged by Petitioners would leave public officials at all levels of government — including many who, like Ms. Jenkins, serve in volunteer or low-paying positions in their local towns and municipalities — vulnerable to any and all accusations levied against them under the guise of petitioning, regardless of merit. Would-be defamers would lack any deterrent and those defamed would lack any concomitant recourse. An absolute privilege would discourage civic involvement for fear of being savaged by extremists of all stripes. This is hardly what the framers intended.

In short, there is no conflict to resolve or error to correct regarding this Court's decision in *McDonald*.

The right of citizens to petition the government is as robust and complete today as it was ever intended to be, affording a qualified privilege to all citizens to petition their government without fear of punishment — subject only to the simple requirement that the citizens not deliberately or recklessly communicate falsehoods when they do so. This limitation, as discussed above, is wholly consistent with the intent of the framers as well as this Court's other precedents.

III. This Case Is Ill-Suited As A Means To Revisit *McDonald*

Even if this court were inclined to revisit the *McDonald* decision, this case is simply the wrong vehicle for doing so. Simply put, not all communications to the government are of the same value or substance, and thus do not acquire the same degree of constitutional protection under the Petition Clause. The paradigmatic petition to the government is a complaint. *Cf. McDonald*, 472 U.S. at 484 ("F]iling a complaint in court is a form of petitioning activity."). On the other hand, innumerable other forms of communications of varying degrees of formality exist. Not all communications to all public officials fall within the full, most-robust protections of the Petition Clause. Various lower courts have explored this spectrum of varying protection and indeed, applying Texas common law, the Court of Appeals in this case found that the communications by Mr. Clark and BCJLO did not constitute petitions of the highest degree and are thus entitled to lesser constitutional protection.

Texas has developed substantial case law recognizing two classes of possible privilege for a

communication to the government. *See Hurlburt v. GulfAtlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). If a communication is made in a legislative, executive, or judicial proceeding, it is afforded absolute privilege. *See Zarate v. Cortinas*, 553 S.W.2d 652, 654 (Tex. Civ. App. – Corpus Christi 1977, no writ); *Koehler v. Dubose*, 200 S.W. 238, 242-43 (Tex. Civ. App. – San Antonio 1918, writ ref'd).[5] This limited guarantee of absolute immunity is "founded absolutely on public policy" and is granted "in the interest of the public welfare." *Koehler*, 200 S.W. at 242. Communications outside this narrow scope, however, are entitled only to a qualified privilege, which is defeated by a showing of actual malice. *See Hurlburt*, 749 S.W.2d at 767-68; *Zarate*, 553 S.W.2d at 655.

The court below held that Petitioners' communication was not made in a legislative, executive, or judicial proceeding. Petitioner addressed his Memorandum to a public official who lacked the subpoena power to conduct a formal investigation or the authority to remove Respondent from office. At most, Congressman Sessions could have informally gathered information and referred matters to the appropriate authorities. Thus, the communication to Congressman Sessions did not warrant absolute privilege under Texas common law.

Similarly, Petitioner's communications to the DOJ's Civil Rights Division were not made in a legislative, executive, or judicial proceeding. By Petitioner's own admission, the communication in

[5] Under Texas jurisprudence, a court of appeals' decision with a "writ refused" designation has the same precedential value as an opinion from the Supreme Court of Texas.

question was intended simply to instigate an investigation rather than assist an ongoing investigation. Therefore, Petitioner's communication to the DOJ also fell outside the scope of the most protected forms of petitioning and was not entitled to an absolute privilege under Texas law.

In addition to underscoring the extent to which the core determinations in this case hinged on state, rather than federal law, the application of Texas law in this case to distinguish communications that enjoy absolute privilege from those that receive a qualified privilege is also consistent with post-*McDonald* developments in the federal courts. *See, e.g., Foraker v. Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (noting that "[p]etitions made through informal channels may occasion a lesser degree of constitutional protection than their formal counterparts"); *San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994) (recognizing that lawsuits and formal grievances, as opposed to mere letters, purport to invoke formal mechanisms for the redress of grievances and as such, are subject to a different standard of analysis); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990) (holding that when "the 'petition' at issue [is] simply a letter imposing on the government no obligation to respond").

IV. This Case Is Not A Proper Vehicle To Clarify Common Law Regarding Republication

Petitioners also assert that "this case provides an opportunity for the Court to resolve conflicts among the lower courts regarding when republication may be punished." Pet. Br. at 31. Specifically, Petitioners argue that "lower courts have been unable to fashion

a coherent, reliable framework for determining whether and to what extent speakers that merely 'report' the allegations of others are immunized by the First Amendment from libel suits." Pet. Br. at 33. The problem with this argument as a basis to grant certiorari in this case, however, is that — according to the jury and the Court of Appeals — Petitioners did not merely "relay allegations" but rather adopted those allegations as their own and even embellished them. Pet. Appx. at 33a-35a.

Petitioners acknowledge that "[m]ost courts do not consider the doctrine applicable to reports that espouse the validity of the allegations themselves." Pet. Br. at 33. And some courts have rejected the doctrine altogether. *Id.* Indeed, Petitioners cannot point to *any court* with a sufficiently broad interpretation of that doctrine to encompass the activities giving rise to liability in this case. As the Court of Appeals noted, "[n]owhere in the Memorandum are the facts or information described as merely the recordation of statements made during meetings of Athens' city government or its concerned citizens." Pet. Appx. at 33a. The Court of Appeals further held:

> Given the gross discrepancies regarding Clark's account of what transpired at the City Council workshop and apparently false allegation and statements contained in his Memorandum, a jury could readily infer that Clark misrepresented facts and states false allegations and opinions in order to attain his predetermined goals. This includes embellishing Burke's allegations related to

> Jenkins to include convictions as well as imprisonment in multiple states.

Id. at 35a.

Simply put, this case — far from "cleanly present[ing] the core question" concerning neutral reportage — does not present that question at all. Indeed, even weeks after circulating the original Memorandum, BCJLO persisted in organizing protests calling for the removal of Ms. Jenkins from the City Council based on the false allegations. As the jury found, this is a case in which the Petitioners far exceeded mere reporting and affirmatively manipulated and misrepresented information to achieve the goal of removing a public official from office.

This Court has already made it clear that in cases such as this one where the "reporter" embellishes or alters what he is reporting or otherwise advances his own position, actual malice exists. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (deliberate alteration is proof of reckless disregard); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (same). This case, therefore, does not actually present the question that Petitioners offer as the final possible basis for this Court's review, but is instead a case that was properly decided by a jury and which does not merit review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID J. SCHENCK
(Counsel of Record)
RICHARD D. SALGADO
JONES DAY
2727 North Harwood St.
Dallas, TX 75201-1515
Tel: (214) 220-3939

SUSAN HAYS
GEISLER HAYS, LLP
2911 Turtle Creek Blvd.,
Ste. 940
Dallas, TX 75219
Tel.: (214) 367-6020

Counsel for Respondent

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IN THE
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PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,

Petitioners,

v.

GLADYS ELAINE BLANTON JENKINS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Seventh District

REPLY BRIEF FOR PETITIONERS

ELIOT D. SHAVIN
LAW OFFICE OF
ELIOT SHAVIN
4054 McKinney Avenue,
Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central
Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street,
Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES CHAD BARUCH
THE LAW OFFICE OF
CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONERS

In *McDonald* v. *Smith*, 472 U.S. 479 (1985), this Court held that the right to petition does not afford absolute immunity against libel actions based on statements made in petitions to government officials. *McDonald* rests on fundamental misconceptions about the history and original understanding of the petition right, conflicts with this Court's interpretation of the petition right in other contexts, and chills individual citizens' exercise of the petition right. By failing to preserve the petition right as it existed in 1791, *McDonald* has unjustifiably limited the exercise of a fundamental right of citizenship upon which, as this Court has said, "to a very large extent, the whole concept of representation depends." See *E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The continuing vitality of *McDonald* is thus an issue of substantial importance that this Court should decide.

Respondent does not address, much less refute, petitioners' central argument that *McDonald*'s interpretation of the petition right is irreconcilable with the text, history, and original understanding of the Petition Clause. See Pet. at 10-23, Br. of *Amicus Curiae* Texas Civil Rights Project ("TCRP") at 6-15. Instead, respondent contends that this case is "ill-suited" as a vehicle for reconsidering *McDonald* because the petition at issue does not "fall within the full, most-robust protections of the Petition Clause." Opp. at 17-19. But if a memorandum addressed to a U.S. Congressman and the Civil Rights Division of

the U.S. Department of Justice seeking "attention and immediate action" and demanding an "investigation" (Pet. App. at 41a) into allegations of egregious civil rights abuses does not constitute petitioning activity of the highest order, it is difficult to imagine what would.

Respondent's attempt to justify *McDonald* on policy grounds, Opp. at 15-17, only underscores the need for this Court's review. If the Petition Clause permits citizens to be held liable in tort for petitioning congressional representatives and law enforcement agencies to investigate claims of governmental abuses, then the more serious the allegations in need of investigation, the greater the threat of liability for defamation – and the greater the resulting chilling effect. That serious chilling effect on law enforcement activities, in particular, is itself reason to grant the petition and re-examine *McDonald*.

A. Respondent Fails To Address, Much Less Refute, Petitioners' Evidence That Review Is Warranted Because *McDonald* Is Inconsistent With The Text, History, And Original Understanding Of The Petition Clause

1. Respondent blithely asserts that the petition right "is as robust and complete today *as it was ever intended to be*." Opp. at 17 (emphasis added). But respondent makes no attempt to address, much less refute, petitioners' evidence that, contrary to *McDonald*, the Petition Clause was originally understood to

provide absolute immunity against libel actions. See Pet. at 11-21.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia* v. *Heller,* 128 S. Ct. 2783, 2821 (2008). Accordingly, this Court often revisits its constitutional holdings, "turn[ing] to the historical background of [a] Clause to understand its meaning," and relying "primarily on legal developments that had occurred prior to the adoption of the * * * Amendment to derive the correct interpretation." *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1035 (2008); *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004) (reconsidering and rejecting the rationale adopted 24 years earlier in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), in light of the "historical background of the [Confrontation] Clause").

Respondent offers nothing to refute petitioners' evidence that *McDonald*'s holding is fundamentally incompatible with the history and original understanding of the Petition Clause. Pet. at 10-23; Br. of *Amicus* TCRP at 6-15. Specifically, there is no indication that the Petition Clause was intended to provide *less* protection in defamation actions than the absolute immunity provided under English law, as *McDonald* wrongly held. Pet. at 15-16, 20-21.

2. Respondent nonetheless insists that review is unwarranted because "lower courts" have "relied upon

[*McDonald*] more than 250 times" since it was decided 24 years ago. Opp. at 8. Given that *McDonald* is the binding precedent of this Court and all lower courts are obligated to follow it, the mere absence of lower-court defiance hardly constitutes a reason not to reconsider *McDonald*.

Similarly, respondent attempts to downplay the substantial scholarly criticism of *McDonald* (Pet. at 21-23) by accusing petitioners of creating a "scholarly consensus" out of "a small handful of selectively culled law review articles." Opp. at 10. That contention is meritless. Respondent's citations of scholarly commentary criticizing this Court's decisions in *Marbury* v. *Madison* and *Brown* v. *Board of Education* (*id.* at 9-10) cannot obscure "[t]he near-unanimous conclusion of the modern commentators, drawing on the rich and important history of the Anglo-American right to petition, * * * that there is more to the Petition[ ] Clause than is generally recognized by the Supreme Court's jurisprudence or by contemporary understandings and practice." Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 799 (1999); see also David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, 142 (1992) (*McDonald* "has produced a clause in the first amendment curiously devoid of meaning"); Eric Schnapper, *"Libelous" Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 347 (1989) (*McDonald* "yielded a result almost certainly contrary to the framers' intent concerning the

petition clause"); Norman B. Smith, "*Shall Make No Law Abridging . . . ": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1153 (1986) (*McDonald* "reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right"). Respondent's attempt to diminish the force of scholarly criticism of *McDonald* thus falls far short.

B. The Opposition Brief Only Confirms That Whether The Petition Clause Affords Absolute Immunity Is An Issue Of Substantial Importance Worthy Of This Court's Consideration

Respondent does not dispute that the proper interpretation of the Petition Clause is an issue of substantial importance. Nor does respondent deny that defamation suits against citizens have proliferated in the wake of *McDonald*. See Pet. at 26-28. Instead, highlighting the importance of the issue and its practical consequences, respondent argues on the merits that overruling *McDonald* would improperly "elevate" the petition right and, in so doing, "invite mayhem in connection with, among other things, confirmation hearings and other essential governmental proceedings." Opp. at 11-13. Neither contention has merit, much less provides a reason to deny review.

1. Contrary to respondent's assertions, overruling *McDonald* would not "elevate" the petition

right into a "new and distinct zone." See Opp. at 13. It would simply restore the level of protection afforded the petition right when the Petition Clause was adopted. Respondent expresses concern about the equitable treatment of rights and privileges (*id.* at 11-13), but adhering to their original purpose and design is the best way to ensure that all constitutional privileges receive proper and equitable treatment. By all accounts, the petition right was afforded broader protection when the Petition Clause was adopted than it has been since *McDonald* was decided. Pet. at 10-23.

Respondent appears to argue that restoring the original understanding of the Petition Clause – *i.e.*, that statements in petitions are entitled to absolute immunity from libel actions – would be inimical to the protected status afforded political speech. See Opp. at 11-12. But that is a false dichotomy. Petitioning the government to take action or inquire into a matter *is* quintessential political speech.[1]

Moreover, respondent does not dispute that the petition right was historically antecedent to free

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[1] Respondent insists that even political speech must "yield[ ] to defamation law," citing *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 572 (1942). Opp. at 12. But *Chaplinsky* involved a breach of the peace, not defamation. To that extent, *Chaplinsky* is entirely consistent with the petition right as it existed in 1791, when several states required that petitions be submitted in an "orderly and peacable [sic] manner." See Smith, *supra*, at 1181-82.

speech rights in the Anglo-American legal tradition. Pet. at 12; Br. of *Amicus* TCRP at 7. The distinct textual guarantees of speech *and* petition in the First Amendment further imply that petitioning interests, while related to free speech, are not identical. See Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 112 (1996). And, because every word in the Constitution "must have its due force, and appropriate meaning," *Wright* v. *United States*, 302 U.S. 583, 588 (1938), the Petition Clause must, at the very least, receive separate analytical treatment.

In addition, respondent ignores that the petition right encompasses not only the expression of political views, but also the promotion of law enforcement. See, *e.g.*, *Forro Precision, Inc.* v. *Int'l Bus. Mach. Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982) (pre-*McDonald* case holding that even though protecting communications between citizens and law enforcement agencies "do[es] not generally promote the free exchange of ideas, * * * [or] * * * influence policy decisions[,]" the law enforcement value of such communications entitles them to immunity). This case is a perfect example, as the petition at issue requested a government investigation into serious allegations of civil rights abuses and government corruption.

This case is therefore an ideal vehicle for this Court to revisit *McDonald* and assess whether exposing citizen petitions to defamation suits under an "actual malice" standard, which permits liability

based on the mere reporting of false statements with "reckless disregard" for their truth, impermissibly chills petitioning activity, particularly with respect to law enforcement. Although *McDonald*'s departure from the original understanding of the petition right may have been intended to protect public officials from the circulation of false and defamatory information, "the possible harm to society in permitting" some false information to go unpunished in petitions for redress is "outweighed by the possibility that" legitimate protected petitioning activity of others "may be muted * * * " See *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002) (holding that a ban on virtual child pornography abridged the freedom to engage in a substantial amount of lawful speech) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973)).

The failure of the actual malice standard to afford adequate protection to citizens who exercise their petition rights is evidenced by the proliferation of lawsuits brought primarily to chill the exercise of those rights, commonly referred to as Strategic Litigation Against Public Participation, or "SLAPP" suits, and the resulting efforts of some states to combat the problem. See, *e.g.*, R.I. GEN. LAWS § 9-33-1 ("there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances"); 735 ILL. COMP. STAT. § 110/5 ("The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these

important constitutional rights."); WASH. REV. CODE § 4.24.500 ("The threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies.").

Indeed, the chilling effect of the actual malice standard is the primary reason this Court has afforded absolute immunity from other forms of civil liability to all *bona fide* petitions under the *Noerr-Pennington* doctrine, see *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 (1991), Pet. at 23-25, and why many state courts still reject the actual malice standard on common law grounds in defamation suits. See, *e.g.*, *Craig* v. *Stafford Constr., Inc.*, 856 A.2d 372, 382 (Conn. 2004) (affording absolute immunity to statements made against a police officer during the course of an internal affairs investigation because "if citizen complaints such as those involved in the present case were not absolutely privileged, the possibility of incurring the costs and inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate grievance from filing a complaint") (internal citation and quotation omitted); *Miner* v. *Novotny*, 498 A.2d 269, 275 (Md. 1985) (absolutely protecting complaints concerning police brutality to prevent the chilling of legitimate grievants). Statements made in *bona fide* petitions to government officials deserve no less protection under the Petition Clause.

2. Respondent contends that the *Noerr* standard is inapplicable in defamation suits because it is

predicated upon the petitioner's "subjective belief" in the truth of a statement. Opp. at 15. Not so. "[C]onstitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964) (internal citation and quotations omitted). Under the *Noerr* standard, a petition is a sham and falls outside First Amendment protection only if it is "*objectively* baseless in the sense that no reasonable [petitioner] could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (emphasis added). Thus, in pre-*McDonald* cases, courts afforded *Noerr* immunity to petitions seeking redress for the improper conduct of local police officials because the petitions, like the memorandum in this case (Pet. App. at 7a-8a), were *bona fide* attempts to procure government action – even if further investigation later revealed the claims to be inaccurate. See, *e.g.*, *Sherrard* v. *Hull*, 456 A.2d 59, 67 (Md. App. 1983); *Webb* v. *Fury*, 282 S.E.2d 28, 40 (W. Va. 1981).[2] Respondent does not dispute that under the *Noerr* standard, notwithstanding any

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[2] Respondent asserts that "the truthfulness of a statement or petition is an essential prerequisite to acquiring constitutional protection in the first instance." Opp. at 14. That is incorrect. Respondent posits that a complaint filed in a judicial proceeding is the "paradigmatic petition to the government" (*id.* at 17), but truthfulness has never been a prerequisite for the absolute immunity afforded to such petitions. Pet. App. at 17a-18a.

finding of actual malice, petitioners would be entitled to reversal of the $500,000 judgment against them for a single statement made in a *bone fide* petition that on its face sought "attention and immediate action by Congress and the Justice Department" in the form of an "investigation" into a series of alleged (and egregious) civil rights abuses. See Pet. App. at 41a.

3. Respondent claims that restoring the historical understanding of the petition right to afford absolute immunity from libel actions "would be detrimental to Democratic government." See Opp. at 15-17. If there is an anti-democratic spirit afoot, it results from *McDonald,* which permits the public servant to make defamatory statements that the public served cannot. Pet. at 27.

Not surprisingly, respondent offers no evidence that there has been a "rushing tide" of horrors when and where immunity for petitions has been broader than that afforded by the actual malice standard, *i.e.*, under *Noerr-Pennington*, in formal legislative and judicial proceedings, and before *McDonald*. There are, however, documented instances of chilled speech resulting from SLAPPs. Pet. at 6 & n.4; *id.* at 26-27; *infra*, at 8-9. And numerous courts have observed that subjecting individuals to liability for statements made in petitions to government officials has the potential to chill citizen reports of violations and abuse by local officials – and thus seriously impede law enforcement efforts. *Miner*, 498 A.2d at 275 ("the inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate

grievance from filing a complaint"); *Forro Precision*, 673 F.2d at 1060 ("[I]t would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information."); *Craig*, 856 A.2d at 382 ("good faith criticism of governmental misconduct might be deterred by concerns about unwarranted litigation").

Contrary to respondent's assertions, the greater threat to representational democracy – not to mention to law enforcement – is posed by the chilling effect on citizen-petitioners created by *McDonald*. See Pet. at 26-28.

C. Respondent Concedes That The Lower Courts Are Divided On The Important First Amendment Issue Of When Republication May Be Punished

Respondent concedes that the lower courts have applied varying levels of protection to petitions that largely relay or republish allegations. Opp. at 20. And respondent does not dispute the need for this Court's review to resolve the conflict and provide guidance in this important, unresolved area of First Amendment law. Instead, respondent claims that this case is an inappropriate vehicle to resolve the issue because petitioners embellished, rather than merely reported, the statements in the memorandum. *Id.* at 20-21. Respondent is wrong.

Even if the jury disbelieved Mr. Clark's testimony that he simply reported in the memorandum what he

was told, the jury's disbelief of that testimony would not establish actual malice under this Court's jurisprudence. Pet. at 34 & n.7 (citing *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). Moreover, the uncontroverted evidence at trial, as acknowledged by the court of appeals, was that someone else gave Clark defamatory information about Ms. Jenkins that he relayed in the memorandum. Pet. App. at 40a; see also *id.* at 30a. That conduct would not have constituted actual malice in jurisdictions where defamation liability does not attach to a report of a third party's allegations of misconduct. See, *e.g.*, *Freyd* v. *Whitfield*, 972 F. Supp. 940, 946 n.11 (D. Md. 1997) (acknowledging that neutral descriptions of third-party defamatory allegations are not actionable). But "no consensus exists within the various federal circuits" on the issue, *Locricchio* v. *Evening News Ass'n*, 476 N.W.2d 112, 131 n.33 (Mich. 1991), as respondent concedes. Opp. at 20.

Thus, in addition to serving as an ideal vehicle to reconsider *McDonald*, this case presents an opportunity for this Court to resolve the conflict in the lower courts on the neutral reportage doctrine. Pet. at 31-35.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIOT D. SHAVIN
LAW OFFICE OF
ELIOT SHAVIN
4054 McKinney Avenue,
Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central
Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street,
Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES CHAD BARUCH
THE LAW OFFICE OF
CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Counsel for Petitioners

Supreme Court, U.S.
FILED
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On Petition For A Writ of Certiorari To The
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BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONERS

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073 [phone]
(512) 474-0726 [fax]

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James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073 [phone]
(512) 474-0726 [fax]

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BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONERS

The Texas Civil Rights Project ("TCRP") is a non-profit public interest law organization that promotes racial, economic, and social justice, as well as civil liberty under the Bill of Rights of the Texas and United States Constitutions. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations.

TCRP has always had a strong interest in ensuring that individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action. Protecting the First Amendment rights of people has always been a priority for TCRP, and it has handled significant free speech cases since its inception. This is reflective of the number of First Amendment issues that arise across the State of Texas.

TCRP was founded in 1990, and has tax-exempt status under federal and state laws. It has participated as amicus curiae in other cases before this Court.[1]

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." This case presents an opportunity for the Court to revisit its analysis of the right to petition. In the process, the Court can begin to retrieve that right from the constitutional oblivion to

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[1] Pursuant to Supreme Court Rule 37(6), amicus curiae states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

which it has been consigned and to restore it to a place more in line with its historical meaning and importance in influencing and incubating the rights associated with the American constitutional form of government.

This case involves a defamation claim asserted against a petition to a United States Congressman on an issue of public significance — racial relations in the City of Athens, Texas. Under the law existing at the time of adoption of the First Amendment, and thus incorporated into that Amendment, the right to petition for the redress of grievances was not subject to prosecution for libel or any other cause. However, in 1985, this Court abruptly concluded that the right of petition is "cut from the same cloth" as the other guarantees of the First Amendment, and that there is no sound basis for granting greater constitutional protection to statements in a petition than to other First Amendment expressions. *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Thus, *McDonald* permitted a libel action against a petition if malice was alleged.

Commentators have roundly criticized this conclusion and have shown, in great historical and analytical detail, that the right to petition had a lengthy pedigree and well-established meaning at adoption of the Bill of Rights that was very different from the other rights enumerated in the First Amendment. Included in this well-understood and now well-documented meaning was immunity from prosecution for statements contained in petitions. TCRP urges the Court re-evaluate its decision in *McDonald* in light of this subsequent scholarly evaluation. A critical and seminal constitutional right depends on it.

ARGUMENT

I. THE COURT SHOULD RECONSIDER *MCDONALD* IN LIGHT OF THE SCHOLARLY EVALUATION AND THE HISTORICAL SIGNIFICANCE OF THE PETITION RIGHT.

A. Introduction

There can be little doubt of the historical pedigree of the petition right, which appeared in the Magna Carta in 1215, the 1689 English Bill of Rights, the Declarations of the 1765 Stamp Act Congress and the 1774 First Continental Congress, and the 1776 Declaration of Independence. Because the petition right developed centuries earlier than the other rights set out in the First Amendment, there is no basis for treating it as simply a subset of the other rights. Immunity from prosecution for exercise of the petition right was well-established by the time the First Amendment was enacted. The holding and analysis in *McDonald* do not hold up under scrutiny, and should be reconsidered.

The holding in *McDonald* produces anomalous results. Perhaps most importantly, the petition right is deprived of independent meaning and relegated to being simply a form of speech, rendering an important clause of the First Amendment redundant contrary to all rules of interpretation. Moreover, under *McDonald* only a petitioner would be subject to the chilling effect of prosecution, not a legislator who received the petition, a governmental official who was its subject, or a witness in a trial, if any of them repeated the statements in the petition or made similar statements. In place of the *McDonald* holding, the Court should adopt an approach to the right of petition similar to that employed in the antitrust context, where legitimate petitioning is protected and only "sham" petitions are subject to liability. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

B. Historical Pedigree of the Petition Right

While the rights of speech, press and assembly were relative newcomers when the Bill of Rights was adopted in 1791, the right of petition had a history stretching back over 500 years. The evolution of the petition right is chronicled in great detail in Norman B. Smith, *"Shall Make No Law Abridging...:" An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153 (1986) and Eric Schnapper, *"Libelous" Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 312-43 (1989). The petition right saw it origins in the years before 1215, when the Magna Carta granted to British nobility the right "to petition [the king] to have the transgression redressed without delay." Smith, *supra*, at 1155. In the following centuries, the right of petition was extended to commoners. After the Glorious Revolution in England, the King accepted the Declaration of Rights in 1689, which provided that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." *Id.* at 1161-62; *see also San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). *McDonald* expressly recognizes the English Bill of Rights as an historical antecedent to the First Amendment petition right. *McDonald*, 472 U.S. at 482. By contrast, the right of speech at the time was viewed as simply freedom from prior restraint, which could be and frequently was punished after the fact as seditious libel. Smith, *supra*, at 1168-69, *citing* Blackstone's *Commentaries*.

Similarly, the right of petition was widely proclaimed in the American colonies. The Stamp Act Congress of 1765 set forth in its Declaration of Rights and Grievances that "it is the right of the British subjects in these colonies to petition the King or either House of Parliament." *Id.* at 1173. Again, *McDonald* recognizes this historical antecedent to the First Amendment petition right. *McDonald*, 472 U.S. at 482. In 1774, the Declaration and

Resolves of the First Continental Congress stated that the colonists "have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." *Smith, supra,* at 1173-74. Finally, in 1776 the Declaration of Independence, after recounting a litany of grievances against the King, listed a final, all-encompassing complaint:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition,* 66 FORDHAM L. REV. 2153, 2192 (1998).

This is not the history of a constitutional appendage, a dead letter, a mere redundancy, simply a particular form of speech. *See San Filippo, supra,* at 442 ("The petition clause of the first amendment was not intended to be a dead letter – or a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press."); 443 ("More to the point, the right to petition has a pedigree independent of – and substantially more ancient – than the freedoms of speech and press."). The right of petition is a vital, independent right of American citizens enshrined in the Bill of Rights, and was well-understood as such when the First Amendment was enacted.

C. Wide Recognition of Immunity for Petitions

A critical part of the petition right at the time it was incorporated into the Bill of Rights was immunity from prosecution for exercise of the right. Like the historical pedigree discussed above, this immunity has been thoroughly documented by scholars in response to the

Court's opinion in *McDonald*. Although *McDonald* dismissed the leading pre-revolutionary immunity precedent, *Lake v. King*, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1680), as "seemingly anomalous," *McDonald*, 472 U.S. at 483 n.4, nothing in the opinion's analysis supports that conclusion. Instead, subsequent historical scholarship demonstrates that the immunity reflected in *Lake* was largely unquestioned when the First Amendment was adopted. *See e.g.* Schnapper, *supra*, at 312-343; Smith, *supra*, at 1181-8; Kara Elizabeth Shea, *Recent Development, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697, 1702-3 (1995).

Several of the landmark documents discussed above that establish the petition right's historical pedigree expressly recognize the immunity attached to acts of petitioning. For example, the 1689 English Declaration of Rights provided that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Smith, *supra*, at 1161-2.

Similarly, the 1774 Declaration and Resolves of the First Continental Congress stated that the colonists "have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." Smith, *supra*, at 1173-4. The framers of the First Amendment would certainly have been aware of these historical predecessors when they proposed that amendment for adoption.

Although *McDonald* dismisses *Lake v. King*, the leading precedent on immunity for petitioning activity at the time the First Amendment was enacted, as "seemingly anomalous," *McDonald*, 472 U.S. at 483 n.4, it was not. Aside from the immunity proclaimed in *Lake v. King*, in the 1689 English Declaration of Rights and in the First Continental Congress's 1774 Declaration and Resolves, one of the most famous cases in English constitutional history,

the *Seven Bishops Case*, involved immunity from prosecution for petitioning the king. Schnapper, *supra*, at 313-329; Smith, *supra*, at 1160-2.

In 1688, James II required that a declaration concerning religious freedom be read from the pulpit of all Protestant churches in England. When the Archbishop of Canterbury and six other bishops submitted a petition challenging the declaration, they were arrested and prosecuted for seditious libel. The bishops cited *Lake v. King* in their defense. Schnapper, *supra*, at 320.

Their subsequent acquittal was a cause for celebration throughout England and encouraged the subsequent Glorious Revolution, in which James II was deposed in favor of William of Orange. *Id.* at 313-4. That revolution produced the English Bill of Rights of 1689, discussed previously, which proclaimed that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Smith, *supra*, at 1161-62.

The justices in the *Seven Bishops Case* squarely rejected the prosecution's contention that a libelous petition is no different than publication of a libelous book, and should be subject to the same penalties. Justice Holloway responded: "[D]on't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition." Justice Powell agreed that a book and a petition "are no more alike than the most different things you can name." *See* Schnapper, *supra*, at 323.

The subsequent assertion in *McDonald* that the petition and other First Amendment rights are "cut from the same cloth" cannot be reconciled with this seminal English case proclaiming immunity for petitions. The framers of the First Amendment would surely have been aware of the *Seven Bishops Case* and its relationship to the Glorious Revolution and English Bill of Rights.

Petitioners' immunity from prosecution was also widely reported in the legal treatises of the revolutionary

period, which again would have been familiar to the framers. Probably the best-known was Blackstone's *Commentaries*, which recognized that "the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal." *See San Filippo,* 30 F.3d at 443 n.23. Another leading treatise, Hawkins's 1716 *Treatise of the Pleas of the Crown,* cited *Lake v. King* for the conclusion that:

> [N]o false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the Peace exhibited to Justices of Peace, or in any other proceeding in the regular Course of Justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutors ....

Schnapper, *supra*, at 339. Bacon's *New Abridgment of the Law*, printed in 1736-66 and found in many colonial law libraries, cited *Lake* and Hawkins for the conclusion that "it hath been resolved, that no false or scandalous matter contained in (a) a petition to a committee of Parliament, or in (b) articles of the peace exhibited to Justices of the Peace, are libelious." *Id.* at 340-1. Several other late-eighteenth century treatises stated the same rule. *Id.* at 341-3.

In sum, immunity for petitions was widely-recognized in the years preceding adoption of the First Amendment. There can be little doubt that colonists of that era, as English subjects, enjoyed such immunity. The First Amendment did not create the right of petition or its associated immunity, but instead prohibited impairment of the existing right. It is anomalous indeed that the right of Americans to petition the government, as it existed when the First Amendment was adopted, has been significantly impaired by the holding in *McDonald.*

D. The Flawed Analysis of *McDonald*

A key flaw of the *McDonald* opinion was that it cited no pre-ratification precedent for its conclusion that

immunity for petitioning was unsettled when the First Amendment was adopted, but instead relied on *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), an antebellum ruling that likewise identified no pre-ratification precedent for its conclusion. *McDonald*, 472 U.S. at 483-84.

As discussed above, the pre-ratification precedent for immunity for petitions was extensive. *McDonald* does not mention any of that precedent except *Lake v. King*, which squarely held that petitions are immune from prosecution for libel. That holding is dismissed in a footnote as "seemingly anomalous," despite the references to it in the *Seven Bishops Case* and in contemporary treatises , and despite its consistency with the 1689 English Bill of Rights and the First Continental Congress's 1774 Declaration and Resolves.

Unlike *Lake*, *White v. Nicholls*, *supra*, the case relied on for the holding in *McDonald*, truly was anomalous. That case, decided in 1845, likely reflected the antebellum hostility toward abolitionist petitions, which had resulted in the imposition of a "gag rule" on petitions in Congress several years earlier. *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113 (1991). *W*

White interpreted the common law right of petition and did not address the First Amendment. It also did not assert that *Lake* was wrongly decided or did not represent the state of the law when the First Amendment was adopted, concluding only that it was inconsistent with "modern adjudications of the courts." Schnapper, *supra*, at 307. As a result, *White* does not provide a clear precedent for the constitutional interpretation in *McDonald*.

Moreover, *White's* holding was premised on the conclusion that defamatory petitions should be subject to the same standard applied to defamatory statements in judicial proceedings, but *White's* application of a malice standard to judicial proceedings was plainly erroneous. *Id.* at 307-9. In fact, just two years before *McDonald*, the

Court dismissed *White's* rejection of immunity for statements in judicial proceedings as "not ... a reliable statement of the common law," noting that even in the mid-nineteenth century *White* was generally regarded as wrongly decided. *Briscoe v. Lahue*, 460 U.S. 325, 332-33 n.12 (1983). As a result, the *McDonald* decision rests on a faulty foundation by relying on *White*, an antebellum decision handed down a half-century after adoption of the First Amendment with analysis recognized as unreliable, instead of examining the understanding of the petition right when the Amendment was adopted.

Much of the analysis of immunity for petitioning has been based on the conclusion that the level of protection should be the same for judicial and non-judicial petitions. Indeed, the right of petition originated before there was a clear distinction between governmental functions, and helped to develop that distinction as certain petitions, based on individual facts, were referred to magistrates for investigation and resolution, while more general, political petitions became the province of an evolving legislature. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22-6 (1993); Shea, *supra*, at 1700-1; Mark, *supra*, at 2166-9.

Several key cases have turned on the principle that petitions should be treated the same whether directed to the judiciary or to other branches of government. The decision in *Lake v. King*, for example, applied the same immunity applicable to judicial proceedings to legislative petitions. Schnapper, *supra*, at 334-36.

Similarly, the opinion in *White v. Nicholls* turned on the mistaken conclusion that since a malice standard applied in judicial proceedings, it should also apply to other petitions. *Id.* at 307-09. *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (concluding that immunity from antitrust liability extends to petitions to all branches of government).

McDonald, however, subverted this consistency by holding for the first time that the protections afforded in a judicial proceeding do not extend to petitions to other branches of government. Schnapper, *supra*, at 344.

The disparate risk of liability for judicial and non-judicial petitions created by *McDonald* creates several unfortunate possibilities. First, a petitioner would be well-advised to take his or her complaint to court rather than to the legislative or executive branches to avoid the risks posed by a defamation suit, whether or not it is meritorious. As a result, pursuit of litigation will be encouraged at the expense of seeking legislative or executive redress.

In addition, the *McDonald* holding allows defamation claims to be a potent weapon for government officials to deter petitions concerning their actions. A defamation claim coupled with an allegation of malice is unlikely to be resolved short of a jury trial. Imagine if southern officials had pursued such lawsuits against civil rights petitions in sympathetic state courts during the 1960's. Similar scenarios are not hard to imagine today. The same rationale that supports immunity in judicial proceedings and other contexts applies to all petitions – exposure to defamation claims poses an intolerable deterrence to exercise of the petition right.

The *McDonald* holding incongruously places the petitioner at significant risk even while other participants in the governmental process are immune from such risk. Schnapper illustrates this imbalance of liability risk in the context of the *McDonald* litigation. Schnapper, *supra*, at 311-12. He points out that McDonald faced liability for criticizing Smith's actions as a state judge and district attorney, although Smith was absolutely immune from liability for statements made in those capacities.

McDonald faced liability for reiterating criticisms of Smith by a federal judge and magistrate, although the judge and magistrate were immune from liability for those criticisms. If the federal officials who received McDonald's

criticisms of Smith had either repeated those criticisms or challenged McDonald's truthfulness, they would have been immune from liability for those statements. Smith's judicial complaint against McDonald, which asserted that McDonald had called him a liar and asserted that, in fact, McDonald's statements were untrue, was immune from liability.

Of all the participants in the process, only McDonald, the petitioner, faced liability for defamation. Clearly, this is not a situation that protects and encourages exercise of the constitutional petition right. Instead, it is a deck stacked against that right, particularly where, as here, the petition was sent only to a governmental official and was subsequently republished several times by individuals with immunity from prosecution.

McDonald creates a situation in which a significant, free-standing right under the First Amendment becomes a redundancy, meaningless verbiage. Far removed from the significance that the petition right assumed in English and colonial history, and that was protected from impairment by the First Amendment, *McDonald* has transformed a petition into simply a form of expression, lacking independent meaning and subject to the same restrictions and responsibilities as any other form of expression.

This result cannot be justified by any principle of statutory interpretation, since the petition clause of the First Amendment must be construed to have meaning rather than being surplussage. Nor can any fair examination of the history and understanding of the petition right at the time of adoption of the First Amendment justify the *McDonald* result. The petition right, and the associated issue of immunity, is ripe for reexamination by the Court.

E. A Better Alternative

One branch of the Court's petition clause jurisprudence – the immunity from antitrust liability established in *Noerr, supra*, and its progeny – is more

consistent with the historical meaning and significance of the petition right than *McDonald*. In *Noerr*, the Court concluded that the Sherman Act cannot be construed to prohibit efforts to persuade the government to take action that may be anticompetitive. *Noerr*, 365 U.S. 127 at 136. The Court noted that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade such freedoms. *Id.* at 138. The Court further concluded that an intent to harm competitors, *id.* at 139,[2] or even the use of underhanded tactics, *id.* at 140,[3] would not nullify the right to petition the government. The Court identified only one circumstance where an appeal to government would not be immune from antitrust liability:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Id. at 144.

In subsequent cases, the Court expanded its application of the petition right to immunize attempts to influence the government from antitrust liability. In *California Motor Transport Co.*, *supra*, at 510, the Court concluded that the rationale of *Noerr* applies to the approach of citizens or groups to all branches of

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[2] "The right of the people to inform their representatives in government of their desire with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."

[3] Concluding that the railroads' publicity campaign, although it "falls far short of the ethical standards generally approved in this country," does not constitute a violation of the Sherman Act.

government because "[c]ertainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." And in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court explained the rationale of the *Noerr* immunity:

> [I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amdt. 1, to establish a category of lawful state action [e.g., anticompetitive regulation] that citizens are not permitted to urge.

Id. at 379. The Court also clarified the "sham" exception to *Noerr* immunity:

> A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, [citation omitted], not one who "genuinely seeks to achieve his governmental result, but does so *through improper means*," [citation omitted, emphasis in original].

Id. at 380.

In *San Filippo, supra*, the Third Circuit followed the rationale of *Noerr* in the context of an alleged retaliatory discharge of a public employee for engaging in petitioning activity. After canvassing *Noerr, California Motor Transport*, and related cases, *San Filippo*, 30 F.3d at 435-37, the Court directed:

> On remand, the district court should consider which, if any, of San Filippo's grievances and lawsuits constituted a "petition," and whether any such "petition" was non-sham. The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.

Id. at 443.

The Court struggled to reconcile the *Noerr* line of cases with *McDonald*, noting that "the Supreme Court cases we have just canvassed, while long on nuance, do not yield an easily identified single common denominator." *Id.* at 438. Ultimately the Court provided the unsatisfying explanation that "*McDonald* is a case in which the petition clause protects no value that is not protected by the speech clause," *id.* at 439, but rejected a similar conclusion in the context of retaliatory discharge of public employees. After noting the petition right's historical pedigree and concluding that it was not intended to be a constitutional "dead letter," the Court concluded that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Id.* at 442-3.

In fact, *McDonald* cannot be reconciled with the treatment of the petition right in *Noerr* and similar cases. While *Noerr* recognizes that constitutionally-protected petitioning activities cannot give rise to liability, *McDonald* permits liability for petitioning. While *Noerr* recognizes immunity without regard to the petitioner's motive or ethics, *McDonald* denies immunity if malice is claimed. While *California Motor Transport* recognizes that the petition right applies consistently to all branches of government, *McDonald* sets up different standards for judicial and non-judicial petitions. These and other aspects of the analysis in *McDonald* are simply inconsistent with the historical meaning of the petition right reflected in pre-ratification material, as well as with the interpretation of the right in *Noerr* and its progeny.

Noerr, *San Filippo*, and similar cases provide a framework for addressing defamation challenges to petitions that, unlike *McDonald*, gives the petition clause of the First Amendment substance consistent with the framers' intent. That framework avoids incenting litigation by giving petitioners to any branch of government

protection comparable to that granted to protect public officials, litigants, and others from the risk of defamation litigation. In this proceeding, the Court should harmonize its petition jurisprudence by correcting the significant error, and the significant diminution of the constitutional petition right, that results from the *McDonald* decision.

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Respectfully submitted,

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741
Telephone: (512) 474-5073
Facsimile: (512) 474-0726

ATTORNEY FOR AMICUS CURIAE